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**LAW COMMISSION
OF INDIA**

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NINTH REPORT

(SPECIFIC RELIEF ACT, 1877)

GOVERNMENT OF INDIA ● MINISTRY OF LAW

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CHAIRMAN,
LAW COMMISSION
NEW DELHI,
JULY 19, 1958.

Shri A. K. Sen,
Minister of Law,
New Delhi.

My dear Minister,

I have great pleasure in forwarding herewith the Ninth Report of the Law Commission on the Specific Relief Act.

2. At its first meeting held on the 17th September, 1955 the Commission decided to take up the revision of the Specific Relief Act and entrusted the task to a Committee consisting of Shri D. Narasa Raju and Shri S. M. Sikri.

3. It was subsequently decided that Shri P. Satyanarayana Rao, the senior Member of the Section of the Commission dealing with Statute Revision should assist the Committee in drawing its report. The consideration of the subject was initiated by Shri Narasa Raju who explained the scheme for the revision of the Act. The principles underlying the scheme were discussed at a meeting of the Statute Revision Section held on the 14th April, 1956. A draft Report prepared on the basis of the scheme by Shri Sikri in consultation with the Members of the Committee was thereafter circulated to all the Members of the Commission and their views were invited thereon. These views with the draft Report were discussed at meetings of the Statute Revision Section held on the 13th July, 1957 and the 7th December, 1957. Important suggestions made by Members at these meetings were accepted and it was left to the Chairman to finally settle the Report in the light of the discussion.

4. Dr. N. C. Sen Gupta has signed the Report subject to a separate note which has been annexed to the Report.

5. The Commission wishes to acknowledge the services rendered by its Joint Secretary, Shri D. Basu, in connection with the preparation of this Report.

Yours sincerely,
M. C. SETALVAD.

REPORT
ON THE
SPECIFIC RELIEF ACT, 1877.

1. The Specific Relief Act was passed in 1877, and has since been amended by Acts 4 of 1882, 12 of 1891, 9 of 1899, 21 of 1929, 10 of 1940 and 3 of 1951. It has also been adapted by the Adaptation Orders, A.O. 1937, A.O. 1948 and A.O. 1950. In 1951, it was extended to Part B States and now it extends to the whole of India except the State of Jammu and Kashmir and the Scheduled Districts under the Scheduled Districts Act, 1874.

2. The Act was originally drafted upon the lines of the draft New York Civil Code, 1862, and its main provisions embody the doctrines evolved by the English Equity Courts, which had previous to the Act been applied in India as principles of equity, justice and good conscience. The Act, on the whole, has worked well but "there is room for improvement both in the expression and the substance".

3. In making our recommendations we have considered the various suggestions received by us and have given effect to such of them as appeared to us to be suitable. We may, at the outset, deal with two suggestions of a fundamental nature.

It has been suggested that there is no justification for a separate enactment on 'specific relief' and that the provisions of this Act should be transferred to the Code of Civil Procedure and other enactments. This suggestion is founded on certain observations of Pollock and Mulla.²

"Specific Relief, as a form of judicial redress, belongs to the law of Procedure, and, in a body of written law arranged according to the natural affinities of the subject-matter, would find its place as a distinct Part or other division of the Civil Procedure Code

If the work were to be done afresh without regard to historical accidents, there would be no reason

History of the legislation.

Major suggestions for revision considered.

1. Banerji, Law of Specific Relief, 2nd Ed., p. 34.

2. Specific Relief Act, 8th Ed., pp. 735, 737.

for having a separate Specific Relief Act at all; its contents would be divided between the Civil Procedure Code and the Transfer of Property Act. Such a drastic reform may well, as things are, not be worth the pains, but some decision in detail appears desirable”¹.

It is to be noticed that even Pollock and Mulla did not consider such a drastic change worth the labour involved. We have given careful consideration to the suggestion, and are unable to accept it. The main consideration which has brought us to this conclusion is that the Specific Relief Act deals with certain equitable principles and remedies which stand apart, both historically as well as intrinsically, from the common law rules which are embodied in our Code of Civil Procedure. The subjects dealt with by the Act, such as, specific performance, declaratory decrees, injunctions, rescission and rectification, usually find a separate treatment in legal literature. Moreover, the legal profession and the Courts have become used to the present arrangement and a change with the sole object of formal perfection would not be justified.

4. A further suggestion is that the Act should also deal with compensatory relief. We are, however, of the view that compensatory relief is inconsistent with and generally an alternative to specific relief and is therefore best dealt with separately. In so far as it is complementary to specific relief, the Act deals with it.

Scheme adopted for revision

5. The Act, as revised by us, deals only with certain kinds of equitable remedies. These are (1) Recovery of possession of property, (2) Specific performance of contracts, (3) Rectification of instruments, (4) Rescission of contracts, (5) Cancellation of instruments, (6) Declaratory decrees and (7) Injunctions. The other forms of specific relief mentioned in Appendix A, Forms 41-6 and 49, of the Code of Civil Procedure and in statutes, such as the Transfer of Property Act, Trusts Act, Partnership Act, are different in origin and nature and no advantage will be gained by including them in this Act.

6. We have tried to improve both the language and the substance of the Act. But it is difficult to avoid the inherent defects which must exist in the codification of

1. Specific Relief Act, 8th Ed. pp. 735, 737.

equitable principles. As Sir Raymond Evershed, Master of the Rolls, has said, "As an equity lawyer, let me acknowledge that I have a natural inclination to favour the undefined and undefinable in the form of principles which have never lost, by unnecessary and constricting definition, their capacity for useful growth. And I would like, here, to make the important point that these undefined principles of equity could never, as far as I can see (save to a very limited extent) be effectively or usefully comprehended, by codification, in the enacted law. At least in so far as they were so comprehended, the functions of the courts in regard to them might thereby be changed—and surely not changed, for the public advantage—from the more or less creative faculty of seeing whether the new relationship or the new set of facts was within or without the embrace of the principle to the narrower task of interpreting the Parliamentary language"¹.

7. Though we have suggested occasional changes in the language of the Act we recognize that this is a matter for the drafting expert and we have left it largely to the official draftsman.

8. In consonance with the recommendations in our previous reports, we propose that all the illustrations in the Act should be omitted. It is true that Whitley Stokes, in his Introduction to the Anglo-Indian Codes,² quoted Macaulay's expectation that the "illustrations will, greatly facilitate the understanding of the law". We are of the view, however, that the illustrations have not on the whole, served to clarify the provisions of the Act. Some of the illustrations are not warranted by the terms of the relevant sections; others have tended to prevent the development of equitable jurisprudence. Moreover, the Indian Legislature has for some time past given up the practice of inserting illustrations in Acts.

9. We now proceed to examine the provisions of the Act pointing out the difficulties which have arisen in the application of the Act and indicating our proposals for their solution.

10. We are of the opinion that the Act should be extended to the territories known as the Scheduled Dis-

Examination
of the
provisions of
the Act,
indicating
the changes
required.

1. 72 L.Q.R., pp. 43-44.

2. Vol. I, p. xxiv.

*The reference in the margin is to the existing Sections.

tricts. If the Transfer of Property Act, 1882 can apply to the Scheduled Districts, there is no reason why the Specific Relief Act should not, particularly in view of the fact that Courts have applied the provisions of the Act to these areas, as principles of 'justice, equity and good conscience'¹.

No doubt, there are the Scheduled and Tribal Areas for which special provisions have been made in the Fifth and Sixth Schedules to the Constitution. Paragraph 5 of the Fifth Schedule and Paragraph 12(1) (b) of the Sixth Schedule empower the Governor of the State in which a Scheduled or Tribal Area is included, to exclude the operation of general Acts of Parliament or of the Legislature of the State to such Areas, by issuing notifications. Thus, the present practice would appear to be to extend all general Acts of Parliament to the whole of India, leaving it to the Governor to exclude the operation of such of them in any Tribal or Scheduled Area, as he may deem fit. It is therefore unnecessary to make any special provision for such Area.

We recommend that the Act should extend to the whole of India except the State of Jammu & Kashmir.

Sec. 3

11. The definition of 'trust' in section 3 of the Act is not satisfactory inasmuch as it refers to 'express', 'implied' and 'constructive' fiduciary ownership, without explaining those terms. Since a definition of 'trust' has subsequently been enacted in the Trusts Act (II of 1882), it is desirable that there should be parity between the provisions of the two enactments. We, therefore, recommend that the existing definition be replaced by one which would comprise a trust as defined in section 3 of the Trusts Act as well as all obligations in the nature of trusts which are included in Chapter IX of that Act. Consequential changes in the definition of 'trustee' have also been suggested.²

A few other drafting changes have been suggested by us in the section.

Sec. 4.

12. Clause (a) of section 4 may be omitted as unnecessary. According to the definition clause, words occurring in this Act, which are defined in the Indian Contract Act, 1872, are to have the meanings respective-

1. *Janardan v. Bhairab*, 30 I.C. 365 (Cal.)

2. *Vide* s. 2 (d), Appendix I.

ly assigned to them in that Act. Under section 2(h) of the Contract Act, only "an agreement enforceable by law is a contract". A mere agreement is not enforceable in law. There is, therefore, no question of any specific relief being granted in respect of a mere agreement which is not a contract. This position will be clear from the new section 8 proposed by us.

13. We are of the opinion that sections 5 and 6 should be omitted. They embody propositions too elementary to be codified and serve no useful purpose. Whitley Stokes¹ considered them unnecessary and recommended their repeal. Secs. 5-6.

14. Pollock and Mulla² have criticised the form of section 7 in the following words— Sec. 7.

"S. 7 is a negative statement of the principle more clearly expressed by saying that, specific relief being a civil remedy, the plaintiff must show some individual right to it in every case....."

We have suggested certain drafting alterations in the section in order to meet this criticism.

15. Except for the substitution of the word 'provided' Sec. 8. for the word 'prescribed', no change is proposed in section 8.

16. As suggested in our earlier Report on the Limitation Act, section 9 should be omitted.³ The object of this section, which corresponds to section 15 of the Limitation Act,⁴ 1859, was to discourage people from taking the law into their own hands, however good their title. It provides a summary and speedy remedy through the medium of the Civil Court for the restoration of possession to a party dispossessed by another, leaving the parties to fight out the question of their respective titles in a regular suit. Sec. 9.

But the section has not served its purpose. The remedy has not been speedy because the evidence which is generally led to establish possession is nearly the same as would be necessary in a title suit. It has been felt that the question of possession cannot be determined without going into the question of title to some extent.

1. Introduction to S.R. Act in the Anglo-Indian Codes, Vol. I, p. 939.

2. Specific Relief Act, 8th Ed., p. 745.

3. *Vide* para. 145 of the Third Report of the Commission (Limitation Act, 1908).

4. Pollock & Mulla, Specific Relief Act, 8th Ed., p. 749.

A decree under section 9 does not determine title, and it is generally followed by a suit for recovery of possession based on title. The result has been a multiplicity of proceedings.

Sec. 10. 17. But for a verbal change, no alteration is proposed in section 10.

Sec. 11. 18. It has been suggested that section 11 is unnecessary and should be omitted. But this section confers a right to a relief which is not given by any other provision of the Act.

First, specific delivery under section 11 is to be distinguished from specific performance of a contract inasmuch as the right of recovery in section 11 is not based on contract but on the right to possess.

Secondly section 11 is to be distinguished from section 10. The distinction between the two kinds of action is fully explained in Banerji's Tagore Law Lectures¹. Under section 10, the suit is, in reality, a suit for recovery of movable property or damages in the alternative and the decree and its execution are governed by the provisions of 0.20, r.10 and 0.21, rr.30-31. Plaintiff himself is obliged to state in his plaint the estimated value of the movables [vide Form No. 32, Sch. I, App. A of the C.P. Code], which would be paid to him if delivery cannot be had [0.21, r.31 (2), C.P. Code].

Under section 11, the plaintiff seeks recovery of the articles *in specie* and has not to state in his plaint the estimated money value of the article; on the other hand, he states that no pecuniary compensation can be assessed or will be adequate relief to him (vide Form 39 of Sch. I, App. A of the C.P. Code). Of course, even in such a case, in default of compliance with the decree, the Court has the power, *inter alia*, to attach and sell the judgment-debtor's property and pay compensation to the decree-holder out of such sale proceeds. But in this case, the amount of compensation need not be equivalent to any estimated value of the article; it is compensation in the proper sense of the term,—the amount being left to the discretion of the Court [0.21, r.31(2), C.P. Code]. In short, "The amount of legal coercion, which can be brought against a defendant to enforce a decree for specific delivery under section 11, is therefore clearly greater than

1. Law of Specific Relief, 2nd Ed., pp. 74-75.

that which can be employed to enforce a decree under section 10"1.

In fact, both sections 10 and 11 relate to what is called an action of *detinue* in England. but while section 10 represents the common law rule, section 11 represents the equitable gloss upon it. As Pollock and Mulla² put it briefly—

"In England a person entitled to the immediate possession of a specific chattel was in principle entitled to recover it by an action of *detinue*. The writ in that action demanded specific delivery. But owing to the defective procedure for the execution of common-law judgments, this could not in practice be enforced. Then a court of equity, when applied to for relief, had to be satisfied that the remedy in damages to the value of the goods, which alone was available for the plaintiff at common law, would not be adequate, or that some specially equitable right of the plaintiff under a trust, for example, was involved."

The equitable gloss, however, applied only to cases where damages could not afford adequate relief³ or where there was a fiduciary relationship between the parties⁴ by reason of which the defendant would be bound, in conscience, to make specific delivery. These special cases are specified in section 11.

In the circumstances we are of the view that Section 11 should not be omitted.

19. We think, however, that it is necessary to clarify the question of the burden of proof under the section. It has been held by the Madras High Court⁵ that in order to obtain relief under the section, the plaintiff must allege and prove not only that the defendant is in possession of the property but that the plaintiff's case is covered by any of the four clauses of the section. This view has been criticised by Pollock and Mulla⁶ as unjust and this criticism has met with judicial approval⁷. Now, since

1. Nelson, Specific Relief Act, p. 115, quoted in Banerji's Law of Specific Relief, 2nd Ed., p. 75.

2. Specific Relief Act, 8th Ed., pp. 756-7.

3. *Vide* Winfield on Tort, 6th Ed., p. 415.

4. Cf. *Wood v. Rowcliffe*, (1847) 2 Ch. 382 (383).

5. *Venkatasubba Rao v. Asiatic Steam Navigation Co.*, (1916) 39 Mad. 1 (F.B.).

6. Specific Relief Act, 8th Ed., p. 757.

7. *Subbarayalu v. Aramalai*, I.L.R. 1946 Mad. 174-179.

in an action of *detinue* Courts in England direct a restitution *in specie* whenever there exists a fiduciary relationship between the parties, it should be for the plaintiff in cases falling under Cl. (a) to establish such relationship. In cases falling under clause (d) also, it should be incumbent upon the plaintiff to establish that the possession of the defendant originated in a wrongful transfer of possession. But so far as cases falling under clauses (b) and (c) are concerned, it should be for the defendant to establish that the article in respect of which possession is claimed by the plaintiff is an ordinary article of commerce having no special value or interest to the plaintiff or that the damage is assessable in money. The principle followed in an action of *detinue*, as explained by Swinifer Eady M.R.¹ is that—

"The power vested in the Court to order the delivery up of a particular chattel is discretionary, and ought not to be exercised when the chattel is an ordinary article of commerce and of no special value or interest, and not alleged to be of any special value to the plaintiff, and where damages would fully compensate".

We recommend that the foregoing principle should be incorporated into the section, as an Explanation.

20. In England² and in America³, one finds that the text-books on Specific Performance deal with the defences open under the law of contract as well as the defences available in equity Courts in proceedings to enforce a contract by way of specific performance. In India, the defences that are available under the law of contract, such as incapacity of parties, the absence of a concluded contract, the uncertainty of the contract, coercion, fraud, misrepresentation, mistake, illegality, or want of authority to enter into the contract, have all been dealt with in the Contract Act. Further, it is provided by section 4(a) of the Specific Relief Act that an agreement which is not a valid contract under the Contract Act is not specifically enforceable.

Hence, a repetition, in the Specific Relief Act, of the defences available under the law of contract may be avoided by inserting in the Act a specific provision to the

1. *Whiteley Ltd. v. Hill*, (1918) 2. K.B. 808 at 819.

2. Fry, Specific Performance, 6th Ed., p. 125 *et seq.*, Halsbury, 2nd Ed., Vol. 31, p. 345.

3. American Jurisprudence, p. 24 *et seq.*

effect that all defences open under the law relating to contracts shall be open to a defendant in a suit for specific performance. We, therefore, propose to insert a new section¹ to the above effect and to omit clause (a) of section 4 which becomes redundant.

21. Clause (a) of section 12 relates to an obligation ^{Sec. 12;} arising out of a trust. Some jurists consider such an obligation as appertaining to the law of contracts but, in view of the definition of a trust in the Indian Trusts Act, such an obligation arises out of an executed contract. The relief by way of specific performance is, on the other hand, available only in respect of executory contracts,² to which the other clauses of section 12 relate. It seems to us, therefore, appropriate to delete clause (a) from section 12 and to place all the provisions relating to trusts together in one section. The only references to trusts, so far as specific performance is concerned, are in sections 12(a) and 21(e). We propose to include both of them in a new section³.

22. Clause (d) of section 12, as pointed out by Banerji,⁴ seems to sanction the doubtful doctrine that insolvency of the defendant is a ground for decreeing specific performance. The ability of the defendant to pay damages never entered into the consideration of Courts of Equity. "Such a rule," as observed by Pomeroy, "makes one under such a contract a preferred creditor". Further, the inadequacy of the legal relief, which is the basis of equitable remedies, is ordinarily in the nature of that relief in cases of a certain type, not in the difficulty of recovery of damages in the individual instance. "It is the contract itself" said Andrews, C. J., "which gives to or takes away from the court its jurisdiction; not the wealth or poverty of the party defendant".⁵

In short, this clause is totally inconsistent with the basic principle followed by the Courts of Equity in England in granting specific performance, namely, the non-existence or inadequacy of the remedy at law, but not merely the impracticability of enforcing such a remedy.

We, therefore, recommend that this clause be omitted.

23. As regards the Explanation to section 12, we think ^{Expl} that the presumption relating to movable property is some-

1. *Vide* s. 8, App. I.

2. Banerji, *Law of Specific Relief*, 2nd Ed., p. 84.

3. *Vide* s. 12, App. I.

4. *Law of Specific Relief*, 2nd Ed., p. 129.

5. *Ibid*, p. 130.

what misleading in its present form and it would be conducive to a better understanding of the law if the exceptional cases where the presumption of adequacy of damages is not applied by the Courts, are also specified. We, therefore, propose to split up the Explanation into two independent sections,—one relating to immovable and the other relating to movable property. While no change is necessary as to the presumption relating to immovable property,—we propose to specify the exceptional cases where Courts in England and India grant specific performance of contracts to transfer movable property, on the presumption that damages would not in such cases give an adequate relief. These are—

- (a) Where the property is not an ordinary article of commerce or is otherwise of special value or interest to the plaintiff¹.
- (b) Where the property is held by the defendant as agent or trustee of the plaintiff².
- (c) Where the property consists of goods not easily procurable in the market.

The last exception has been specially developed in the United States³. Courts have enforced specific performance of contracts to furnish gas, water or other necessary materials to a manufacturing establishment, where the thing contracted for is not immediately available from other sources and a breach of the contract would stop the operations of the plaintiff's establishment. The same principle is applied where the goods are such that they can be supplied by no one except the defendant. A contract to furnish stone from a certain quarry for building was enforced where the stone was of a peculiar colour and the building was partially constructed from the stone already furnished. Even a contract for the delivery of a motion-picture film to an exhibitor has been enforced.

In view of the vast economic developments which are taking place in India, we would recommend the adoption of this exception from the American Law.

Sec. 13. 24. It is not clear from the language of section 13 whether the section has an independent existence or has to be read along with the succeeding sections relating to

1. Cf. *Pusey v. Pusey*, (1684) 1 Vern. 273; *Flacke v. Gray*, (1859) 4 Drew 65.

2. *Wood v. Rowcliffe*, (1844) 3 Hare 304.

3. 49. Am. Juris, ss. 126, 128, pp. 149, 152.

partial performance. Collett¹ as well as Banerji² have taken the latter view. We think it should be made clear that the principle embodied in section 13 is a general principle which has to be borne in mind while applying sections 14 to 16. We propose to amalgamate sections 14—17 into one section and to append section 13 in a modified form as an Explanation thereto, omitting the reference therein to section 56 of the Contract Act.

25. While section 17 enunciates the general rule that Secs. 14—17. the Court will not enforce specific performance of a part of a contract, sections 14, 15 and 16 provide exceptions to this general rule, and the Privy Council has held³ that sections 14—17 taken together constitute a complete Code and that any claim for specific relief of a part of a contract must be brought within the terms of these sections. In these circumstances, it is desirable to amalgamate sections 14 to 17 into one section and to provide that the court shall not direct the specific performance of a part of a contract except as provided therein.

26. No change in principle is required in sections 14, Secs. 14, 16 and 17. 16 and 17.

27. Section 15 contemplates two types of cases, namely, Sec. 15. (i) where the part, which must be left unperformed, forms a considerable portion of the whole but admits of compensation in money, and (ii) where it does not admit of compensation. In our opinion, the principle embodied in the section, as it stands, is inequitable so far as the former case is concerned; for, where monetary assessment of the part unperformed is possible, there is no reason why the plaintiff should not get a proportionate abatement of the consideration when he is to relinquish all claim to further performance or any further compensation for the breach. In the latter case, on the other hand, no question of abatement arises because apportionment of the consideration is not possible.

We have, in Appendix I, suggested a redraft of the section, in conformity with the above view.

28. There is some uncertainty as to whether section Sec. 18. 18 covers the case of an absence of title as distinguished from that of an imperfect title. The section mentions only

1. Collett, Law of Specific Relief, p. 117.

2. Banerji, Specific Relief, 2nd Ed. p. 282.

3. *Graham v. Krishnachandra Dey*, (1925) 52 Cal. 335 P.C. at p. 338.

'imperfect title'. But according to a Nagpur decision,¹ the wording of clause (a) of section 18, whereby the vendee can compel the vendor to make good the contract out of 'any' interest in the property subsequently acquired by the vendor, "indicates that an imperfect title would include even complete absence of title".

The English law, as stated in *Holroyd v. Marshall*² is that—

"....if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained."

A defendant cannot be permitted to say that he did not mean to acquire that interest.³ Accordingly, it would be advisable to make the position clear by including in section 18 the case of a total absence of title.

29. The applicability of sections 14 to 16 in a case falling under section 18(a) came up for the consideration of the Supreme Court in *Kalyanpur Lime Works Ltd. v. State of Bihar and anr.*⁴

In that case, the facts,⁵ in short, were that A agreed to grant a lease to B for a period of 20 years commencing from a specified date. At that time A had no title to grant the lease, but, subsequently, A acquired title at a time when only 6 years were left out of the 20 year-period of the lease agreed to be given to B. B brought a suit for specific performance claiming a lease for a period of 20 years from the date when A acquired title to grant the lease. It was contended⁶ on behalf of B (plaintiff) that he was entitled to specific performance of the original contract and that the Court was competent to reconstruct the contract in the context of the changed circumstances in order to give him the relief to which he was entitled under the original contract. The Patna High Court⁵ held that section 18(a) gave no power to the Court to reconstruct the contract, but that the Court could enforce the contract only to the extent that it was

1. *Piendlik v. Jainarayan*, A.I.R. 1949 Nag. 82.

2. 10 H.L.C. 191 (211).

3. *Fry*, Specific Performance, 6th Ed., p. 464.

4. (1954) S.C.R. 958.

5. See *Dalmia Jute & Co. Ltd. v. K. L. Works*, A.I.R. 1952 Pat. 393.

6. *Ibid.*, pp. 400-401.

possible in the changed circumstances, if the plaintiff so desired, and that the plaintiff might get a decree for the remaining six years of his term under the original contract, provided he complied with the provisions of section 15. These two propositions of law were accepted by the Supreme Court¹.

It is, therefore, advisable to make it clear that sections 14 to 16 apply also to cases covered by section 18.

30. *In Dalmia Jain & Co. v. K. L. Works*²,—there was Cl. (a), a controversy whether section 18(a) of the Specific Relief Act applied to executory contracts at all. Das J. accepted the contention of the appellants that both section 18(a) of the Specific Relief Act and section 43 of the Transfer of Property Act related to the same subject-matter, *viz.*, executed contracts and observed:

“I am of the view that the words used in clause (a) such as ‘sale or lease’ are only apt and appropriate to executed contracts.”²

It is, however, to be noted that the opening words of section 18 refer to ‘contracts to sell or let’ and the word ‘contract’ is also mentioned in the latter portion of clause (a) itself. It is obvious that section 18(a) refers to contracts to sell or lease, i.e., executory contracts, while section 43 of the Transfer of Property Act applies to executed contracts. Otherwise, it is difficult to distinguish between the two provisions. The distinction is thus brought out by Mulla³—

“Section 43 follows the equitable rule in that until the option is exercised, it treats the transferee as the beneficiary of a trust But it departs from the equitable rule in that it does not require the transfer to be effected by a further conveyance If the transferee were enforcing the contract under section 18(a) of the Specific Relief Act, the transferor would be required to execute a further conveyance. But under section 43 the exercise of the option or

1. (1954) S.C.R. 958.

2. A.I.R. 1952 Pat. 392 (409); (see also Reuben J. at pp. 404-5, who observes that “the words ‘sale or lease’ appear to be used in contrast to the word ‘contract’.”).

3. Transfer of Property Act, 4th Ed., p. 196.

the mere requisition of the transferee is sufficient to bring the subsequent interest within the scope of the original transfer."

The words 'sale or lease', as observed by Das J.,¹ do appear to be apt or appropriate to executed contracts only. We recommend that these words be substituted by the word 'contract', which will refer to the 'contract to sell or let' mentioned in the opening sentence of section 18.

Cl. (b). 31. Clause (b) of section 18 refers to cases like contracts for the assignment of leasehold interest where the lessor's consent is necessary for the same. As was observed in *Bain v. Fothergil*,²—

"whenever it is a matter of conveyancing and not a matter of title it is the duty of the vendor to do every thing that he is able to do by force of his own interest and also by force of the interest of others whom he can compel to concur in the conveyance."

"But Equity will not compel a vendor to procure the concurrence of parties whose concurrence he has no right to require".

The requirement of concurrence seems to be the essence of the clause but there are cases where concurrence alone may not be enough and if a conveyance by another person, who is bound to convey at the vendor's request, is required, there is no reason why the vendor should not be compelled to get the conveyance from that person by a resort to legal proceedings, if it cannot be had amicably. Suitable changes have been suggested in clause (b) to make this clear.

Cl. (c). 32. Clause (c) imposes an obligation upon the vendor to obtain a conveyance from the mortgagee, in case of sales of mortgaged properties. A conveyance from the mortgagee is however not necessary except in the case of an English mortgage or a mortgage by conditional sale. The words 'where necessary' should, therefore, be inserted in clause (c).

33. Where a claim for specific performance is refused, the plaintiff may, in certain cases, be entitled to get a

1. *Dalmia v. K. L. Works*, A.I.R. 1952 Pat. 393 (4c9).

2. (1874) 1 H.L. 158, 209.

3. *Dart, Vendor & Purchaser*, 8th Ed., Vol. II, p. 924.

refund of earnest money or purchase money¹ or other sum deposited by him as a pre-payment.

Section 18(d) of the Act deals only with the right of the defendant to a refund in a case of refusal of specific performance on the ground of imperfect title of the vendor or lessor. But there are cases where the plaintiff who is a purchaser or lessee and whose claim for specific performance is refused is entitled to a refund².

In *England*, it was held in earlier cases³ that where the remedy of specific performance was refused on merely equitable grounds, the purchaser could recover damages for breach of contract but could not recover his deposit. But section 49(2) of the Law of Property Act, 1925, now provides that the Court may "order the repayment of any deposit" either in an independent action for its return or in a suit for specific performance "where the Court refuses to grant specific performance". Hence, either party may, in a suit for specific performance, claim repayment of any deposit when the claim for specific performance is refused.

In *India*, in some cases, a claim for refund of the earnest money has been made in the alternative in a suit for specific performance⁴ and it has been held that even in the absence of a specific prayer⁵ for return of earnest money, the Court may, in a suit for specific performance, direct a refund while refusing specific performance, if the facts disclose a case for such a refund.

On the other hand, there has been some uncertainty as to the right of the plaintiff to ask for an amendment claiming such a relief at a late stage of the proceeding. While in some cases it has been held that such an amendment should be allowed at any stage of the litigation⁶ there is a contrary view⁷ that the appellate court should not give this relief where the plaintiff has not initially claimed it as an alternative relief in his suit for specific performance.

1. *Munni v. Kamta*, A.I.R. 1923 All. 321; *Govind v. Miraji*, (1944) Nag. 718.

2. *Amma v. Udit*, (1898), 31 All. 68 P.C.; *Abdul Rahman v. Rahim Bakshi*, A.I.R. 1929 Lah. 332; *Raghu Nath v. Chandra*, 17 C.W.N. 100; *Fibrosa v. Fairbairn*; (1942) 2 All. E.R. 122 (H.L.); *Munshi v. Vishnu*, A.I.R. 1954 All. 450.

3. Cf. *Re. National Provincial Bank*, (1895) 1 Ch. 190.

4. *Amma v. Udit*, (1898) 31 All. 68 P.C.; *Karasanad v. Chhotalal*, A.I.R. 1924 Bom. 119; *Natesa Aiyar v. Apparu Padayarhi*, 38 Mad. 178.

5. *A.J. Majith v. Krishnaswami* A.I.R. 1955 Mad. 591 (593); *Raghunath v. Chandra* 17 C.W.N. 100.

6. *Ibrahimhai v. Fletcher Ors., Road*, (1896) 21 Bom. 827.

7. *Somasundram Chettiar v. Chidambaram Chettiar*, A.I.R. 1951 Mad. 282.

We are of the view that, as in the matter of compensation, the law should not allow a decree to be made without a proper pleading, but that the Court should try to prevent multiplicity of proceedings by allowing amendment seeking to introduce a claim for a refund or a similar relief, even at a late stage. We recommend that a specific provision, on the above lines, should be inserted in the Act, enabling a person to obtain a refund or similar relief in a suit for specific performance.

34. We have next to consider whether it should be made obligatory on the plaintiff to make the claim for a refund in the suit for specific performance itself.

Pollock and Mulla¹ have suggested that it is "..... desirable that the right to return of the deposit should be determined in the suit for specific performance....."

It has however been generally held that a separate suit lies for a refund of the earnest money, even though the suit for specific performance has been dismissed².

Having regard to the fact that the number of such suits cannot be considerable. We do not think it right to recommend a provision barring such suits.

35. It will be useful, we think to introduce a rule which has been now settled by judicial decisions, that in order to avoid multiplicity of proceedings the plaintiff may claim a decree for possession in a suit for specific performance even though, strictly speaking, the right to possession accrues only when specific performance is decreed³.

No doubt, it has been laid down that possession can be asked for in execution of a decree for specific performance even though possession was not claimed in the plaint, on the ground that the relief of possession is merely incidental to that of execution of a deed of conveyance⁴. At the same time it has been held that the plaintiff decree-holder does not acquire title or the right to recover possession

1. Specific Relief Act, 8th Ed., p. 782.

2. *Munni Bibi v. Kamta Singh*, (1923) 45 All. 378. (This is also the law in England under the law of Property Act, 1925). Of course, in the case of default by the vendor, the purchaser may, instead of suing for specific performance, sue only for refund of the deposit with or without damages (*Natraran v. Uluk Chand*, A.I.R. 1926 (Cal. 1041).

3. *Krishnaji v. Sangappa* A.I.R. 1925 Bom. 181; *Velayunda v. Kumaraswamy*, 52 I.C. 700 (Mad.) : *Ramachandraracharyulu v. Rangacharyulu* A.I.R. 1926 Mad. 1117.

4. *Kartik v. Dibakar*. A.I.R. 1952 Cal. 362 *Arjun Singh v. Sahu* A.I.R. 1950 All. 415.

unless a sale-deed is executed in execution of the decree for specific performance¹. We think it would be simpler to make a statutory provision enabling the plaintiff to ask for possession in the suit for specific performance and empowering the Court to provide in the decree itself that upon payment by the plaintiff of the consideration money within the given time, the defendant should execute the deed and put the plaintiff in possession².

On the same principle, where the vendor or lessor is a joint tenant, and the suit for specific performance is brought by his purchaser against the co-tenant in possession of the entire property, it has been contended that the plaintiff should be permitted to ask for a partition as well as possession in the same suit³. In *Bhagwan v. Krishnaji*⁴, Heaton J., however, thought that on principle it was not proper that a transferee should have specific performance in such cases as it would lead to further litigation because "he will be unable to obtain separate possession of it without bringing a suit for partition."

In the circumstances, we consider it advisable to provide that the plaintiff, in a suit for specific performance, may also claim the ancillary reliefs of partition on possession either initially or by an amendment at a later stage without prejudice to his right to compensation under section 19.

36. There has been some difference of opinion among the High Courts as to the meaning of the word 'compensation' in section 19. The Calcutta High Court⁵, while interpreting Article 116 of the Limitation Act, has observed:

"As Lord Esher observed in *Dixon v. Calcraft*⁶, the expression compensation is not ordinarily used as an equivalent to damages, although as remarked by Fry, L.J. in *Skinner's Co. v. Knight*⁷, compensation may often have to be measured by the same rule as damages in an action for the breach. The term compensation as pointed out in the Oxford Dictionary, signifies that which is given in recompense, an equivalent rendered. Damages, on the other hand,

1. *Enayat Ullah v. Khalil Ullah*, A.I.R. 1938 All. 432.

2. Cf. *Abdul v. Abdul*, 46 Mad. 148.

3. *Rangayya v. Subrahmaniam*, 40 Mad. 365 (373-4).

4. (1920) 44 Bom. 967, 972.

5. *Md. Mozahurai Ahad v. Md. Azimaddin Bhuiya*, A.I.R. 1923 Cal.

507, 511, 512.

6. (1892) 1 Q.B. 458.

7. (1891) 2 Q.B. 542.

constitute the sum of money claimed or adjudged to be paid in compensation for loss or injury sustained; the value estimated in money, of something lost or withheld. The term compensation etymologically suggests the image of balancing one thing against another.....”

On the other hand, the Nagpur High Court¹ has held that the word compensation used in section 19 of the Specific Relief Act should be understood in the sense of damages as contemplated in section 73 of the Contract Act. The same conclusion might be said to follow also from the observation of the Privy Council in *Ardeshir's case*² that section 19 of the Specific Relief Act, with the exception of the Explanation, embodies the same principle as Lord Cairns' Act, which enabled a suitor to claim both specific performance and damages for breach of contract in the same proceedings. But the Privy Council did not disapprove of the view expressed in the Bombay High Court³ by Macleod C.J. that the word compensation was used with the intent to emphasise the fact that the Court in awarding compensation was not bound to follow the ordinary rules with regard to damages for breach of contract and that the measure of damages was not necessarily the same as in a suit for damages for breach of contract. Later, however, the Privy Council in a case⁴ under S. 19 upheld a decree on the footing of 'damages' for breach of contract. In a Bombay case⁵ Chagla J. (as he then was) has held that in deciding whether the plaintiff is entitled to compensation, the principle, which the Court must adopt, is the same as underlies section 73 of the Contract Act, that is to say, the plaintiff is bound to prove some loss or damage. But there may be cases where the injury cannot be assessed in terms of money. In such cases, the Court would award nominal damages.

In these circumstances, we think it is desirable to provide that compensation under the present section should be assessed on the same principles as are followed under section 73 of the Contract Act.

37. There has been a difference of judicial opinion as to whether the Court has power to award compensation

1. *Pratapchand v. Raghunath*, A.I.R. 1937 Nag. 243; *Dwarhuprasad v. Kathelon*, A.I.R. 1955 Nag. 38.

2. (1928) 52 Bom. 597 P.C.

3. *Sassoon v. Ardeshir* A.I.R. 1926 Bom. 189.

in a suit for specific performance, where the plaintiff has not specifically prayed for it in the plaint.

The Lahore¹ High Court has held that the Court has the power to award damages whether in substitution for or in addition to specific performance even though the plaintiff has not specifically claimed it in the plaint.

The Madras² High Court has, however, held that the Court cannot award damages in addition to specific performance in the absence of a specific claim for damages and a proper pleading stating why the relief of specific performance would be insufficient to satisfy the justice of the case and the amount which should be awarded.

The Madras view would appear to be based on the principle that there should be a proper pleading in every case. While it is proper that the Court should have full discretion to award damages in any case it thinks fit, one cannot, on the other hand, overlook the question of unfairness and hardship to the defendant, if a decree is passed against him, without a proper pleading.

What we recommend is that in no case should compensation be decreed unless it is claimed by a proper pleading. It should be open to the plaintiff to have an amendment, at any stage of the proceeding, in order to introduce a prayer for compensation, whether in lieu of or in addition to specific performance.

38. Section 20 does not state the entire law relating to Sec. 20, liquidation of damages as a bar to specific performance. It appears that the principles of English law on this subject have been applied by the courts in our country. It would therefore be expedient to codify those principles.

In interpreting section 20 the Courts³ in India and the Judicial Committee⁴ always sought to ascertain the intention of the parties, on the true construction of the contract.

There may however be cases in which the circumstances indicate that the parties intended that in the event of a breach of the contract only the payment of money by way of damages should be ordered and not specific performance⁵.

1. *A.P. Pratinidhi Sabha v. Lahori*, (1924) 5 Lah. 509.

2. *Somasundram v. Chidambaram*, A.I.R. 1951 Mad. 282.

3. Cf. *Sadiq Hussain v. Anup Singh*, (1923) 4 Lah. 327; *Kandasami Shanmuga*, A.I.R. 1949 Mad. 302.

4. *Bisssesar v. Vas*, (1927) 55 Cal. 238 P.C.

5. *Kandasami v. Shanmuga*, A.I.R. 1949 Mad. 302, (303).

A reading of the decisions referred to will show that our courts have followed the *English law* thus stated in Halsbury'—

"Where the contract contains a stipulation that in the event of non-performance a certain sum of money shall be paid, that fact is not in itself decisive in considering whether or not specific performance should be granted. Nor does the distinction between penalty and liquidated damages affect the answer to this question. The answer is to be found by considering the intention of the parties, that is, whether the party bound to performance has an alternative choice given to him by the contract, to perform or to pay the agreed sum, or whether he is bound to do a certain thing, with a penal sum or sum by way of liquidated damages attached as security. In the latter case the Court, notwithstanding the penal clause, enforces performance, if the contract be such that without the penal clause it would have been proper for specific performance".

We recommend that these principles should be incorporated into the section, with a proviso that the plaintiff cannot have both specific performance and the sum specified in the contract.

Sec. 21. 39. Some of the clauses of section 21 require in our view amplification.

Cl. (a). Thus, while as a general rule, contracts to lend or mortgage are not specifically enforced, as they come under clause (a), there are certain exceptional cases where specific performance has been granted by the Courts upon the assumption that damages would not afford adequate relief in such cases, and these exceptions should be mentioned in the section itself, to make it comprehensive.

These exceptional cases are as follows:—

1. Where a loan has been advanced either in whole or in part by the lender on a contract to execute a

mortgage, but the borrower refuses to execute the mortgage, specific performance of the contract can be obtained if the borrower is not willing to repay the loan at once¹. Where a part of the loan only has been advanced, the lender must be ready and willing to advance the remaining sum according to the agreement.

2. Another such case is the specific performance of a contract to subscribe for debentures of a company. Though Section 122 of the Companies Act, 1956 provides for the specific performance of such a contract we think it would be expedient, for the sake of comprehensiveness, to make a provision in this Section.

40. No change is necessary in clause (b).

Cl. (b).

41. Pollock and Mulla² point out that clause (c) appears to be redundant inasmuch as under section 29 of the Contract Act, a contract "which is not certain, or capable of being made certain," is void. We agree with this view and recommend that clause (c) be omitted.

42. As the illustration to clause (d) says, an agreement for partnership is not generally specifically enforced³. But there are some exceptional cases where such agreements have been enforced. Thus, where the parties have actually entered on the partnership by having commenced the business to be carried on in partnership, a suit lies for obtaining execution of a formal deed of partnership⁴. A contract for the purchase of the share of a partner has also been specifically enforced⁵.

We therefore propose to provide for such cases. We also suggest that the word "revocable" in clause (d) be substituted by the word 'determinable', for as Pollock and Mulla⁶ observe, the expression 'revocable contract' is inaccurate.

43. We have transferred clause (e) to a separate section Cl. (e). relating to trusts which we have suggested⁷.

1. *Jewan Lal v. Nilmani*, A.I.R. 1928 P.C. 80; Fry, Specific Performance 6th Ed. p. 24; 49 Am. Juris., S. 83, p. 101.

2. Specific Relief Act, 8th Ed., p. 790.

3. Limdley on Partnership, 11th Ed. p. 582, Halsbury, 2nd Ed., Vol. 31 para. 486.

4. *Byrne v. Reid*, (1902) 2 Ch. 735; *Vindachala v. Ramaswami*, (1863) I M.H.C.R. 341.

5. *Dodson v. Donehey*, (1901) 2 Ch. 620.

6. Specific Relief Act, 8th Ed., p. 790.

7. See s. 12, App. I.

Cl. (f). 44. In view of the new section 8 proposed by us clause (f) appears to us to be unnecessary and should be omitted.

Cl. (g). 45. In clause (g), the limit of three years, which is a departure from the English rule, is artificial and arbitrary. We have no hesitation in recommending the omission of the time-limit and the substitution of the proper rule, *viz.*, that the Court will not decree specific performance if the contract involves the performance of such a continuous duty that the court is not able to supervise it.

46. A contract to build or repair would come within clause (g) and would not, generally be specifically enforced¹. But such a contract is enforced in England² and in America³ in certain exceptional circumstances. Such a contract would be specifically enforced if the building or work is defined by the contract with sufficient particularity so as to enable the court to determine the exact nature of the work, or that the plaintiff has a substantial interest, in the performance of the contract, so that compensation for its breach would not be an adequate relief and that the defendant has under the contract obtained possession of the land on which the work is to be carried out.

In our view provision should be made in the clause for such a case.

Cl. (h). 47. We recommend the omission of clause (h) in view of the new provision recommended by us in section 8.

Sec. 22
Clas.-III. 48. Clause I of section 22, as it stands, is somewhat vague. If the circumstances mentioned in the clause are such as render the contract voidable, it is open to the party who has the option, to avoid it and no question of specific performance may thereafter arise.

There are, however, certain circumstances in which a Court of equity refuses to decree specific performance, on

1. *Ramchandra v. Ramchandra*, I.L.R. 22 Bom. 46.

2. Halsbury, 2nd Ed., Vol. 31, para. 365, p. 333; Fry, 6th Ed., p. 48; Dart, Vendor & Purchaser, Vol. II, p. 879; *Wolverhampton Corporation v. Emmons* (1901) 1 K.B. 515.

3. Pomeroy, Specific Performance, 3rd Ed., s. 23; Story, *Equity Jurisprudence*, 1920, p. 308.

the ground of unfairness, even though in law the circumstances are not such as to render the contract voidable. Such unfairness may be due either to the terms of the contract or the conduct of the parties, or other circumstances, existing at the time of the contract. Thus, the Court will not decree specific performance to compel the defendant to perform an act which would inevitably subject him to some penal consequences, such as an action for damages or to a criminal prosecution. Even if the performance of the agreement does not involve a breach of trust, a court of equity is always reluctant to enforce an agreement against trustees which may injuriously effect their interest or that of their beneficiaries. A contract of sale, therefore, made by trustees in an unbusinesslike manner will not generally be enforced, unless it is clearly established that the price was adequate. The general doctrine in regard to contracts the performance of which involves a breach of trust or an unlawful act applies not only to technical trustees but also to all persons occupying a fiduciary relation or position of confidence towards others, including agents, directors of corporations, assignees in bankruptcy and the like. We, therefore, suggest that the scope of clause I should be clarified by providing that the unfair advantage referred to in this clause may be due to circumstances which may not be sufficient to render the contract voidable.

49. It is not possible to exhaustively enumerate the grounds of unfairness or of hardship mentioned in clause II. As stated by Pomeroy¹, "the variety of forms of hardship and unfairness is infinite; the Courts, therefore, in dealing with these subjects have wisely refrained from limiting themselves by special rules. In this particular field precedents are of comparatively little value." There are however certain circumstances which, by themselves, have been held not to constitute an unfair advantage or hardship. Thus the fact that the contract is onerous to the defendant or improvident in nature²⁻³, or that there is inadequacy of consideration⁴⁻⁵, will not be circumstances falling within clause II. It would be advisable to

1. Pomeroy, *Specific Performance*, p. 126 n.

2. *Davis v. Maung Shwe Goh*, 38 Cal. 805 (PC); *Ram Sundar v. Kali*, A.I.R. 1927 Cal. 889.

3. 49 American Jurisprudence, p. 75.

4. *Haywood v. Cope*, (1858) 25 Beav. 140 (150-3).

5. Cf. *Norasingh Row, v. Rangasami Theron*, 35 I.C. 871; *Pichai v. Chaturbhuj* A.I.R., 1933 Mad. 736.

add an Explanation to the section making this position clear.

50. It is not clear from clause II at what point of time the circumstances causing the hardship must exist in order to be a ground for refusing specific performance.

In *England*, it has been established that as a general rule hardship, to operate as a ground of defence, must have existed at the time of the contract, and not arisen subsequently from a change of circumstances.¹⁻².

In India, too, it has been held that circumstances which have subsequently arisen such as a rise in prices owing to external circumstances, like war conditions³, or the results of litigation⁴, do not constitute 'hardship' which can be relieved against, under clause II:

A subsequent change of conditions causing hardship may, however, be a ground for refusing specific performance where it has been brought about by the acts of the plaintiff⁵.

We recommend that the foregoing principles be incorporated in an Explanation to the section.

51. It is not clear from the Act, to what extent, if at all, the doctrine of mutuality is applicable in India. The principle of mutuality of remedy is thus stated by Fry⁶:

"A contract to be specifically enforced by the Court must, as a general rule, be mutual,—that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them. When, therefore, whether from personal incapacity to contract, or the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is generally, incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former."

1. Halsbury, 2nd Ed., Vol. 31, Para. 420.

2. Fry on Specific Performance, 6th Ed., pp. 199, 202.

3. *Sankaralinga v. Ratnasami*, A.I.R. 1952 Mad. 389 (393).

4. *Ramalinga v. Jagdammal*, A.I.R. 1951 Mad. 612; *Shib Lal v. Collector of Bareilly*, 16 All. 423.

5. Halsbury 2nd, Ed., Vol. 31, Para. 420; 49 Am. Juris., p. 78.

6. Fry on Specific Performance, 6th Ed., p. 219.

The doctrine has been criticised both in *England*¹ and the U.S.A.²

According to *Ashburner*¹ the doctrine of want of mutuality as formulated by Fry "appears to be an unfortunate invention of Lord Redesdale and although it has often been spoken of with respect, it does not appear to form the *ratio decidendi* of any line of cases." He points out that the illustrations given by Fry in support of his proposition do not support him.

In an illuminating article on the subject, Ames³ strongly criticizes the rule as generally stated, and sets out no less than eight propositions, each one of which is at variance with the statement just quoted.

In *India*, it was at one time thought⁴ that the doctrine of mutuality had been rejected by the Indian Legislature on the ground of its artificiality. But the Privy Council applied it in *Sarwarjan's case*⁵ and observed that since it was not within the competence of a manager or guardian to bind the minor or his estate by a contract for the purchase of immovable property, the minor also could not enforce such a contract, after attaining majority, because there was a want of mutuality.

In the aforesaid decision their Lordships of the Judicial Committee⁶ did not examine the provisions of the Specific Relief Act nor consider the question whether there was any reason for applying the doctrine of mutuality under it. After this decision, the question has come up for consideration before the High Courts on several occasions, particularly with reference to contracts for the purchase or sale of immovable property entered into by guardians on behalf of minors. The decisions are, by no means, uniform and the attempt of the courts has, of late, been to avoid as far as possible the application of the doctrine.

In cases governed by Hindu Law after a later decision of the Judicial Committee⁷, it is settled that a guardian

1. *Ashburner*, *Equity*, 2nd Ed., p. 405.
2. 49 Am. Juris., s. 35, p. 49; *Williston on Contracts*, ss. 1439, 1446.
3. Ames, *Mutuality in Specific Performance*, 3 *Columbia Law Rev.* I.
4. *Whitley-Stocks*, *Anglo-Indian Codes*, Vol. I, p. 931; *Krishnasami Sundrappa* *yyar*, (1894) 18 Mad. 415.
5. *Mir Sarwarjan v. Fakhruddin*, (1911) 39 Cal. 232 P.C.
6. *Ibid.*, p. 237.
7. *Subrahmanyam v. Subba Rao*, A.I.R. 1948 P.C. 95.

is competent to alienate the property of a minor for purposes of legal necessity or for the benefit of the estate and that, accordingly, such a contract is specifically enforceable both by and against the minor¹. The Full Bench of the Andhra High Court has extended this doctrine to contracts for purchase of property entered into on behalf of a Hindu minor, though the Court conceded that "It may perhaps be more difficult in the case of a purchase by a guardian on behalf of a minor to sustain it on the ground of necessity or benefit.....".

In any event, where the personal law of a minor enables a valid contract to be made by a guardian on behalf of the minor, no question of mutuality really arises, for the contract is binding on both parties. The position is the same where such a power is conferred by or under other law, e.g., the Guardians and Wards Act, 1890².

Now contracts made by the guardian of a Hindu minor, whether for purposes of legal necessity or not, have ceased to create any problem which might necessitate the application of the doctrine of mutuality, for, the Hindu Minority and Guardianship Act, 1956 (XXXII of 1956) lays down the conditions under which only the guardian can bind the minor's property, and further enacts a specific prohibition that in no case can the guardian bind the minor by a personal covenant [S. 8(1)].

There exists no such statutory provision in regard to persons other than Hindus. But even under the Mahomedan law, it has been held that a contract for the sale of a Mahomedan minor's property by his *de jure* guardian is enforceable both by and against the minor, if it is for the minor's benefit³.

There is still however scope for the application of the rule in *Sarwarjan's case* in the case of contracts for the purchase of property on behalf of a minor which cannot be said to be for the benefit of the minor⁴. We do not consider it necessary to import the doctrine of mutuality into our codified law of specific performance to cover such cases. On the contrary we would do away with the doctrine in *Sarwarjan's case*⁵ by inserting, in section 22, a

1. *Srirama Rao v. Venkatarama Reddiar*, A.I.R. 1956 Mad. 261 (F.B.); *Suryaprasadam, v. Gangaraju*, A.I.R. 1956 Andhra 33(40) F.B.

2. *Babu Ram v. Saidunnissa*, (1913) 35 All. 499.

3. *Imambandi v. Mutsaddi*, A.I.R. 1918 P.C. 11.

4. *Amir Ahmad v. Meer*, A.I.R. 1952 Hyder. 120 (F.B.).

5. *Mir Sarwarajan v. Fakhruddin*, (1911) 39 Cal. 232 P.C.

provision embodying the law as stated in the American Restatement¹ as follows:—

“The fact that the remedy of specific enforcement is not available to one party is not a sufficient reason for refusing it to the other party”.

There will thus be no room for the application of the doctrine of mutuality in any suit for specific performance.

52. The words 'his part' in the concluding portion of Sec. 23. clause (b) of section 23 are ambiguous and have led to a difference of opinion amongst commentators. While according to Banerji², the representative or principal of the contracting party can, in the case of a contract personal in nature, sue only if the party had himself performed his part of the contract, Nelson's³ view is that the representative or principal could sue after performing what was to be performed by the party. But in a contract of a personal nature, it would be unfair to impose on the other party a performance by a third party except where he has accepted such substituted performance. We have suggested that suitable changes should be made in the clause to make this clear.

53. In our coming report on the Contract Act, we intend to recommend a general rule that a third party to a contract who is entitled to a benefit thereunder or has an interest therein is entitled to sue upon the contract, subject to certain limitations. Once such a general provision is made, it will be unnecessary to retain the provisions contained in clauses (c) to (f) of section 23 of the Specific Relief Act. We suggest that these clauses be replaced by one clause,—referring to the relevant provision of the Contract Act.

54. In clause (g), we suggest the omission of the word 'public', since the nature of the provision is such that it should be made applicable to all companies governed by the Companies Act.

A similar change should also be made in clause (d) of section 27.

1. Contract s. 372 (1).

2. Banerji, Law of Specific Relief, 2nd Ed., p. 399 (The same view appears to have been taken in *Mahendra v. Samu*, 7 C.W.N. 229).

3. Nelson, Specific Relief Act, p. 203.

Cl. (b).

55. Clause (h) of section 23 and clause (e) of section 27 deal with the 'pre-incorporation contracts of comparators.

Clause (h) of section 23 says that a company may, after its incorporation, enforce contracts made by the promoters of the company with third parties, provided such contracts were within the purposes of the company and the terms of its incorporation. Section 27(e) lays down the converse rule of liability of the company in respect of similar contracts made by the promoters. These two provisions of our Act are founded on the English law as it stood at the time when the Act was passed¹.

Later English decisions have taken the view that a company is neither bound by² nor entitled to take the benefit of³ the pre-formation contracts made by its promoters.

The provisions of the Specific Relief Act have, however, been applied in India even recently⁴, without referring to the change in judicial opinion in England. Though a company cannot technically ratify a contract made before its incorporation, there would appear to be no reason why the company should not be entitled to choose to take the benefit or the burden of a contract made on its behalf by its promoters, by communicating its acceptance of the benefit or the burden to the other party to the contract. There is no provision in the Companies Act, 1956 which prevents a company from accepting the benefit or burden of a pre-incorporation contract.

We, therefore, recommend that clause (h) of section 23 and clause (e) of section 27 be retained, with suitable verbal changes indicating that the contract would be enforceable by or against a company if the company accepts the contract and signifies its acceptance to the other party to the contract.

Sec. 24.

56. In clause (a) of section 24, the words 'could not' are not quite clear and have occasioned a difference of views among the commentators as to their meaning⁵.

1. *Earl of Shrewsbury v. North Staffordshire Ry. Co.* (1865-66) 1. Eq. 593.
2. *In re English & Colonial Produce Co., Ltd.*, (1906) 2 Ch. 435 (C.A.).
3. *Natal Land Co. v. Pauline Colliery Syndicate Ltd.*, (1904) A.C. 120; *Newborne v. Sensolid Ltd.*, (1953) 1 All. E.R. 708 (C.A.).
4. *Commissioner of IT. v. Bhurangiya Coal Co.*, A.I.R. 1953 Pat. 298 (300).
5. Collet, Law of Specific Relief, 3rd Ed, p. 207; Banerji, Law of Specific Relief, 2nd Ed., Appendix p. 79.

We, therefore, recommend that in clause (a) of section Cl. (a). 24 the words 'would not be entitled to' be substituted for the words 'could not'.

57. It has been laid down in England as well as in Cl. (b). India that the plaintiff in an action for specific performance of a contract is desentitled to the remedy not only where he has violated any of its essential terms but also where he has acted in contravention of it, without violating any of its terms.

Thus, in Fry¹ it is observed:

"We shall now consider the closely allied cases where he (the plaintiff) has disentitled himself, not by default merely, but by acts in *fraud* or *contravention* of the contract, or at variance with it, or tending to its rescission and the *subversion* of the *relation* established by it. For where the party to a contract, who asks the intervention of the Court, for its specific execution, has been guilty of such conduct, that circumstance may be put forward as a defence to the action".

This principle has been applied in India by the Privy Council in *Srish v. Banomali*². In dismissing a suit for the specific performance of a compromise,—the judicial committee observed:

"the conduct of Krishna was at variance with, and amounted to a subversion of, the relation intended to be established by the compromise".

In our view this principle should be incorporated into the section by adding suitable words at the end of clause (b) of section 24.

58. We are of the opinion that clause (c) is unnecessary Cl. (c). in view of the provisions of Order II, r.2 of the Code of Civil Procedure. If a person has obtained a decree for compensation for breach of contract he cannot again sue for specific performance, whether satisfaction of the decree is obtained or not, as his cause of action gets merged in the decree. The cause of action in breach of contract, whether the relief claimed is damages or specific performance, is the same and if the plaintiff is entitled to more

1. Specific Performance, 6th Ed., s. 957, p. 450.
2. (1904) 31 Cal. 584 (596) P.C.

than one relief, either singly or in the alternative, he must sue for the same in the same suit and cannot reserve it except with the leave of the Court [O.II, r.2(3),C.P. Code].

Cl. (d).

59. Clause (d) of section 24 and clause (c) of section 25 may be omitted as both of them are founded on the English law as it stood under a Statute of the 16th century, which has since been altered by legislation. A conveyance without valuable consideration was voidable at the suit of a supervening purchaser for value with notice. This has ceased to be the law in England since the Voluntary Conveyance Act, 1873 (56 & 57 Vic.),—now replaced by the Law of Property Act, 1925 (s. 173). Again, under our Law, a prior settlement of property divests the title of the settlor immediately and any conveyance thereafter from the settlor to another, even if it be for consideration, would be ineffective to convey any title.

60. It has been held by the Privy Council that in a suit for specific performance, the plaintiff must show that all conditions precedent have been fulfilled and also allege and (where the fact is traversed) prove a continuous readiness and willingness to perform the contract on his part, from the date of the contract to the time of hearing¹. Though there is no express requirement to this effect in the Specific Relief Act, it has been held that failure to allege readiness and willingness will lead to a dismissal of the suit².

But the plaintiff need not prove performance of or over readiness and willingness to perform non-essential terms; or

terms of a separate or collateral contract; or terms, the performance of which has been prevented or waived by the defendant; or

terms, the performance of which has became impossible without the plaintiff's fault.

We consider that the doctrine of readiness and willingness so formulated should be incorporated into our Act.

61. There is, however, a conflict of judicial opinion as to the exact scope of the plaintiff's readiness and willingness required by the doctrine.

1. *Ardesir Mama v. Flora Sasson*, 52 Bom. 597.

2. *Madan v. Kamaldhari*, A.I.R. 1930 Pat. 121-127.

In England, it has been held¹ that a plaintiff claiming specific performance, who insists on a wrong interpretation of the contract, does not lose his right to specific performance in accordance with its right interpretation where the defendant offers to perform the contract as rightly interpreted.

In India, the Calcutta² and Nagpur³ High Courts have taken the view that the plaintiff must allege and prove his readiness to perform the contract as it really was and not as it was alleged by him to be. Thus, where a purchaser sought specific performance alleging that he was always ready and willing to pay Rs. 85 which, according to him, was the price fixed by the contract, but the Court found that the price fixed by the contract was, in fact, Rs. 130, the suit for specific performance was dismissed⁴. Similarly, it has been held that, if the plaintiff insists on a condition which he is not entitled to under the contract as properly interpreted, his suit for specific performance must fail⁵.

The Madras High Court⁶ has taken the view that even where the plaintiff alleges that the consideration payable by him was different from the real amount, there is a sufficient averment on the part of the plaintiff of his readiness and willingness to perform his part of the contract, if he adds in the plaint that 'he has no objection to paying the defendant any sum that the Court should be pleased to fix'⁶.

We are, inclined to prefer the Madras view and recommend that the plaintiff should be entitled to specific performance if he avers performance or readiness and willingness to perform the contract according to its true construction.

62. In connection with contracts for sale, a question has arisen whether in order to establish his readiness and willingness the plaintiff should have made a tender of the money due from him to the defendant. The further question which has been raised is whether the purchaser

1. *Berners v. Fleming*, (1925) Ch. 264 (CA); Halsbury, 2nd Ed., Vol. 31, p. 436.

2. *Parul v. Saroj A.I.R.* 1948 Cal. 147; *Rustomali v. Ahider*, 45 C.W.N. 837.

3. *Shamjibhai v. Fagoo*, 1949 Nag. 581 (607-10).

4. *Rustomali v. Ahider*, 45 C.W.N. 837.

5. *Shamjibhai v. Fagoo*, I.L.R. (1949) Nag. 581 (607-10).

6. *Arjuna v. Lakshmi*, A.I.R. (1949) Mad. 265.

must, in order to show his readiness and willingness, tender the money on the date fixed by the contract for completion. In a Calcutta¹ case, it was held that such a tender must be made, while in a Bombay case², it was held that an actual tender was not necessary for a suit for specific performance, and it was enough if payment was made as directed by the Court. The Bombay view seems to have support in the observations of the Privy Council in *Bank of India v. Chinoy*³, where it has held that the plaintiff in such a suit need not deposit the money in Court or prove his financial competence.

Having considered the different aspects of the question, we recommend that it should be provided that it is not essential that the plaintiff should tender the money to the defendant or deposit it in Court except when so directed⁴.

Sec. 23. 63. Section 18 speaks of property generally and section 25 refers to movable and immovable property. It is, however, not clear how far the provisions of these two sections apply to contracts for the letting of movable property. Nor do the reported decisions throw any light on this point.

It may not be strictly accurate to describe contracts for the letting and hiring of movable property as contracts of lease. Letting and hiring of movables is really a contract of bailment which is governed by Chapter IX (sections 148 to 170) of the Indian Contract Act, 1872. If the bailor does not deliver the movable property which is the subject-matter of the contract, the bailee may have his remedy against the bailor for recovery of possession of the property. There is no provision in the Indian Contract Act for the enforcement of such a contract. The matter must, therefore, be governed by sections 10 and 11 of the Specific Relief Act. After the termination of the period of letting or hiring the bailor would be entitled to a return of the property and a corresponding duty is imposed on the bailee by ss. 160 and 161 of the Indian Contract Act, 1872.

Even in the case of contracts for the sale of movables the scope for the application of sections 18 and 25 is rather narrow inasmuch as it is only in the case of articles of

1. *Manik. v. Abhoy*, 37 I.C. 257.

2. *Tribhobandas v. Balmukundas*, 67 I.C. 865.

3. A.I.R. (1950) P.C. 90 (96).

4. *Vide Expl. (i) to s. 14, App. I.*

special value that contracts for the sale of movables are specifically enforced.

We therefore recommend that, for the sake of clarity, sections 18 and 25 should deal only with immovable property and, that, a residuary section should be enacted, extending the provisions of these two sections, *mutatis mutandis*, to movables, so that possible cases calling for the application of either of those provisions may be covered.

64. We have already recommended the omission of clause (c), of section 25 [Para. 59, *ante*].

65. Clause (b) contains certain non-technical words such as 'surprise' and 'misapprehension', the use of which has been commented upon. Thus, Pollock¹ says—

"The use of the word 'surprise' now seldom if ever heard in an English Court,..... may be taken as no more than a piece of abundant caution."

Banerji² observes that at one time the word 'surprise' was used as almost synonymous with 'fraud'. Collett's view is that 'surprise' takes place "when something has been done which operated to mislead or confuse the party on the sudden"³. 'Surprise', accordingly, does not go beyond the concept of fraud. We have not been able to find any Indian decision where specific performance has been granted with a variation on the ground of surprise.

As regard 'misapprehension' Collett⁴ suggests that it means mistake in regard to the effect or consequence of the contract as contrasted with mistake in regard to the terms of the contract. Banerji⁵, further, says that the addition of the word 'reasonable' to qualify 'misapprehension' does not make much material difference in its meaning. While clause (a) deals with a mistake as to the terms of contract, clause (b) seems to deal with a mistake as to the effects of the contract.

If so, it is possible to incorporate clause (b) with clause (a), with suitable drafting changes.

66. As Banerji⁶ points out, clause (c) means nothing more than that the terms of the contract in writing

Sec. 26,
Cl. (b).

1. Tagore Law Lectures on Fraud, p. 74.

2. Specific Relief, 2nd Ed., p. 342.

3. Collett, Law of Specific Relief, 3rd Ed. p. 220.

4. *Ibid.*, 3rd Ed., pp. 220-244-45.

5. Specific Relief, 2nd Ed., p. 343.

6. *Ibid.*, p. 247.

do not embody the whole agreement between the parties, and that the plaintiff must fulfil his entire engagement before he can have specific performance.

That being so, clause (c) also may be amalgamated with clause (a), with suitable drafting changes.

Cl. (d). 67. Clause (d), however, cannot be amalgamated with clause (a) because here, as Banerji¹ points out—

“Neither party is to blame; both were agreed as to their object, *viz.*, some legal result; but by reason of error in drafting, they are both balked of their purpose....”.

In other words, the discrepancy in the written instrument may not be due to any fraud, mistake or misrepresentation of either party but may be due to the ignorance or carelessness of the draftsman, and that is why clause (d) does not start with the words “where by fraud or mistake.....”, as clauses (a) and (d) do.

We do not propose to alter clause (d).

Cl. (e). 68. Only a drafting change has been suggested in clause (e):

Sec. 27. 69. In section 27, clause (e) has to be omitted in view of the present state of the law relating to promoter contracts (*vide* Para. 55, *ante*). In clause (d), the word ‘public’ should be omitted inasmuch as the principle embodied in the clause is applicable to all companies.

Sec. 27A. 70. In our report on the Registration Act², we have recommended the exclusion of ‘agreement to lease’ from the definition of lease in section 2 and the omission of clause (c) from section 49. The result of these changes will be that an agreement to lease, even if in writing, will not require registration; and, even an unregistered deed of lease will be admissible in evidence to prove an agreement to lease.

In the result, a person will be entitled to enforce specific performance of an agreement to lease even if it has to be gathered from an unregistered lease deed. Hence, section 27A of the Specific Relief Act will be unnecessary, whether it is interpreted to be applicable to an unregistered agreement for lease or an unregistered deed of lease.

1. *Ibid.*, App. p. 87.

2. Sixth Report of the Law Commission, para. 21, p.10.

We therefore recommend that section 27A be omitted.

71. The entire contents and arrangement of section 28 Sec. 28. have been severely criticised by Pollock and Mulla¹ :—

"This section is incongruous, misplaced, and altogether an unsatisfactory piece of work. If it means more than an exhortation to administer the remedy now in question on the principles declared in the Contract Act, secs. 15-22; if it purports to confer on the Court a discretion to apply, for this purpose, a standard different from that of the general law; and if, in particular, I.C.A., sec. 22 is to be considered inapplicable in suits for specific performance—then it ought not to have been mixed up with provisions relating merely to procedure, but, as materially enlarging the discretion of the Court, should have followed sec. 22 of the present Act and should have made the intention more explicit.."

Having regard to this comment we recommend the incorporation of the provision into section 22,—making it clear that even where the mistake or misrepresentation is not such as to render the contract voidable, the Court may refuse to enforce specific performance where it would be inequitable on the part of the plaintiff to obtain the relief [See s. 21(2) (c) of Appendix I].

Section 28 may, therefore, be omitted.

72. As we have included in the Act specific provisions Sec. 29. enabling a plaintiff to ask for reliefs such as a refund of earnest money, in a suit for specific performance, we recommend that, by way of abundant caution, it should be made clear that the dismissal of a suit for specific performance will not bar a suit for any relief other than damages. We have suggested suitable alterations in section 29 in this behalf.

73. Section 30 provides, *inter alia*, that the provisions Sec. 30. of Chapter II relating to specific performance of contracts will also apply to a suit for the enforcement of an award. When this provision was made there was no enactment in force in India relating to arbitration.

Since the enactment of a comprehensive law of arbitration in the Arbitration Act, 1940, the scope of the

1. Specific Relief Act, 8th Ed., p. 823.

application of section 30 has become very limited. Under section 14(2) of the Arbitration Act, an award made by arbitrators without intervention of Court may be filed in Court for enforcement, by application made by either party to the arbitration agreement, within 90 days of the date of the service of notice of the making of the award (Art. 178, Limitation Act). Thereupon follows an executable decree under section 15, if the Court sees no reason to remit or set aside the award. Hence, if the procedure under Section 14(2) of the Arbitration Act be followed, there would be no need for any of the parties to resort to a suit for specific performance.

But under the provisions of section 30 of the Specific Relief Act a party to an award may also bring a regular suit to enforce such award without adopting the procedure laid down in the Arbitration Act. Prior to the enactment of the Arbitration Act, 1940, it was held that the procedure laid down in Schedule II of the Civil Procedure Code was not exclusive and it was not imperative upon a plaintiff who sought to enforce an award, to resort to that procedure¹.

But after the passing of the Arbitration Act, 1940, there has been a difference of opinion on the question whether a suit still lies to enforce the award under the provisions of the present section of the Specific Relief Act in view of section 32 of the Arbitration Act, which says:

"Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act".

The Madras² and Patna³ High Courts have held that by reason of the words 'notwithstanding any law' in the above section, the only procedure for enforcing an award now is an application under section 14 of the Arbitration Act and that a suit is no longer maintainable.

1. *Subbaraya Chetti v. Sadasiva Chetti*, 20 Mad. 490.

2. *Moolhcad v. Rashid*, A.I.R. 1946 Mad. 346.

3. *Ramchander v. Munshiman*, A.I.R. 1950 Pat. 48 (50).

The Nagpur¹ and Calcutta² High Courts, on the other hand, maintain that section 32 of the Arbitration Act bars a suit challenging an award and not a suit for enforcing the award and that section 32 of the Arbitration Act has not abolished the right to bring a suit under section 30 of the Specific Relief Act.

The Arbitration Act is a consolidating enactment and its territorial application is co-extensive with that of the Specific Relief Act. The enforcement of the award under the Arbitration Act takes place through the Court which has jurisdiction, in the same proceeding, to remit, modify or set aside the award. All the reliefs relating to the award are, accordingly, available in the proceeding under the Arbitration Act.

We are, therefore, of the view, that no separate suit should lie in cases where the Arbitration Act is applicable and that the scope of section 30 of the Specific Relief Act should be confined to cases of arbitration under other laws, the operation of which is saved by sections 46 and 47 of Arbitration Act.

It is, accordingly, suggested that the following amendments be made:—

(1) *Section 30 of the Specific Relief Act:*

Add the words "to which the Arbitration Act, 1940 does not apply" after the word 'awards'.

(2) *Section 32 of the Arbitration Act 1940:*

Insert the word "enforced" after the words "nor shall any arbitration agreement or award be", and amend the marginal note in the section accordingly.

74. In England, the Court of Appeal has held³ that the articles of association of a company cannot be rectified by a court even though they do not conform to the concurrent intention of the signatories to the articles and that the only mode of altering them is the passing of a special resolution in the manner provided by the Companies Act [*vide* s. 23 of the Companies Act, 1948 (11 and 12 Geo. 6, c. 38)]. Since there is a corresponding provision in section 31 of our Companies Act, 1956, articles of association may be excluded from section 31 of the

1. *Nanheal v. Singhai*, A.I.R. 1944 Nag. 24.

2. *Munsh:al v. Modi Bros.*, (1947) 51 C.W.N. 563.

3. *Scott v. Frank F. Scott* (Lond.) Ltd. Ors., (1940) Ch. 794 (804) C.A.

Specific Relief Act, following the principle laid down in the English decision.

75. The words "may institute a suit" are not quite happy and seem to suggest as if the relief of rectification can be granted only if a separate suit is brought for the purpose. It has been held that in a suit for damages for breach of contract, the court may allow the plaintiff to ask for the necessary rectification by amending the plaint¹, subject of course to the law of limitation.

The court has sometimes given substantive relief to the plaintiff, after rectifying the instrument, even though the relief of rectification had not been specifically asked for². A justification for such power is given in American Jurisprudence³ thus—

"According to strict practice, in a law action in which an equitable cause for reformation is not asserted, the written contract will be given full force and effect and a plaintiff will not be heard to say that it does not express the real agreement of the parties But in jurisdictions in which the distinctions between law and equity are abolished, or in which both forms of relief are administered by the same court, in an action at law upon an instrument the court may, in a proper case, construe the contract as it was intended by the parties, or supply matters omitted either by mutual mistake or fraud, and render a proper judgment on the basis thereof, as if there had been first a reformation of the contract. The judgment may confer only the final legal remedy, the preliminary equitable relief being assumed as a pre-requisite, but not in terms awarded."

There is greater reason for the exercise of such a power in India where there exists no distinction between law and equity. It is therefore proposed that it should be provided that the relief of rectification may be obtained not only in a suit specifically brought for the purpose but also in a suit in which any right arising under the instrument is in issue.

76. It is not quite clear from the Statute itself whether a plea by way of rectification can be taken in defence and, if so, what are the conditions subject to which it is available.

1. *Raipur Mfg. Co. v. Venkatsubba Rao & Co.*, A.I.R. 1921 Mad. 664.

2. *Kota v. Kannekant*, A.I.R. 1916 Mad. 795.

3. 45 Am. Juris. pp. 589-90.

In *England*, it is now clearly laid down by s. 39(1) of the Supreme Court of Judicature (Consolidation) Act, 1925 as follows:

"The Court or Judge shall have power to grant to any defendant in respect of any equitable estate or right or other matter of equity and also in respect of any legal estate right or title claimed or asserted by him—(a) all such relief against any plaintiff—or petitioner as the defendant has properly claimed by his pleading, and as the court or judge might have granted in any suit instituted for that purpose by that defendant against the same plaintiff or petitioner;"

In *India*, it has been held by the High Courts of *Bombay*¹, *Calcutta*², *Madras*³ and *Nagpur*⁴ that even where under the law of procedure the defendant is not entitled to make a counter-claim, the defendant should on the principle of 'justice, equity and good conscience'⁵, be allowed to raise in defence any plea that would have enabled him to obtain rectification in a suit, instead of being driven to a separate suit. So long as the remedy of counter-claim is not available in all courts, it would be desirable to enact the principle established by the cases just cited.

77. The question then arises, under what conditions should the defendant be permitted to raise this plea. In the case of *Shiddappa v. Rudrappa*⁶, the defendant's right to bring a suit for rectification was not barred by limitation and emphasis was laid on that fact.

But there are cases⁷ in which it has been held that the defendant should be allowed to raise the plea even though his right to sue for rectification is barred by limitation.

We are of the view that the conditions in the case of the plaintiff and the defendant should be the same. This result could be secured by providing that either the plaintiff or the defendant may have relief by way of rectifica-

1. *Shiddappa v. Rudrappa*, A.I.R. 1954 Bom. 463; *Dagdu v. Bhana*, (1904) 28 Bom. 420 (426).

2. *Binns v. W. & T. Avery Ltd.*, (1934) 61 Cal. 548.

3. *Rangasami v. Souri*, (1916) 39 Mad. 792.

4. *Rajaram v. Manik* A.I.R. 1952 Nag. 90.

5. Pollock and Mulla support this view (Contract and Specific Relief Act, 8th Ed., pp. 831-2). It is also in conformity with S. 92 (1) of the Evidence Act.

6. A.I.R. 1954 Bom. 463.

7. *Kesho Singh v. Roopan Singh*, A.I.R. 1927 All. 355.

tion, but only if it is specifically asked for in his pleading, whether initially or by amendment.

78. We propose to omit both sections 32 and 33.

Secs. 32-33

So far as section 32 is concerned, it is an ambiguous provision which has led to speculation amongst commentators and we have not been able to find any decision where this section has been applied or interpreted.

Pollock in his Tagore Law Lectures¹ observed—

"The 32nd section is a striking example of the misguided ambition that pervades the New York draft..... What is the 'equitable and conscientious agreement' which the Court must be satisfied that the parties intended to make? Is it something more than a lawful agreement? And if so, what are the additional elements? On what authority this section is supposed to be founded I know not".

Baherji² thinks that the section was enacted so that the court may not be compelled to "go through the useless formality of rectifying the written expression of a contract which it will not enforce specifically."

It is doubtful, however, whether the scope of rectification should be so narrowed down. For, a plaintiff suing or intending to sue for damages, may be in need of rectification. In the U.S.A.³, it has been held that the Court will not rectify an instrument which will remain invalid or inoperative even if it is brought into conformity with the alleged intention of the parties.

In our view, there is no need for a provision that the Court will not rectify an invalid agreement; for, the word 'contract' in section 31 means an enforceable agreement.

As to section 33, its object is only to enjoin the Court to discover the real intention of the parties instead of inferring the intention from the language of the instrument itself. But no separate section is necessary for this purpose. We propose to make this duty of the court clear by verbal changes in section 31, after dividing it into sub-sections.

Sec. 34.

79. We recommend no change in section 34 except that it may be amalgamated with section 31, as a sub-section thereof.

1. Pollock on Fraud (T.L.L.), p. 122.

2. Law of Specific Relief, 2nd Ed. AIPU., cp. 102.

3. 45 Am. Juris. p. 580.

80. In *England*, where the defendant in an action for specific performance fails to comply with a judgment against him, the plaintiff may, at his election, move in the action to have the contract rescinded¹. This right extends to the vendor and the vendee. The Indian Courts have taken the same view².

In all probability, the English rule was sought to be Cl. (c), adopted, without modification,³ in the third paragraph of section 35(c) of our Specific Relief Act. But, as has been pointed out by Collett,⁴ as well as in the cases mentioned below⁵⁻⁵, the words, 'in the same case' are not happily chosen and 'It is not at all clear to what these words in the same case refer whether to the second paragraph or the first paragraph of clause (c)'⁵.

The question is, whether the vendor or lessor should have the option of bringing a separate suit for rescission, in a case coming under cl. (c). As the section stands, he has the option of bringing a separate suit under the first paragraph of section 35 or to apply for rescission in the same suit under the third paragraph of the section.

But, as Banerji⁶ observes, there is no reason why the vendor or lessor should be allowed to harass the other party in a separate proceeding when the remedy of rescission can be made available in the same suit.

We therefore propose a new section⁷ which will enable the vendor or lessor to apply for rescission in the suit for specific performance, if the purchaser or lessee fails to comply with the terms of the decree. In view of this new provision, clause (c) of section 35 and the two succeeding paragraphs become unnecessary and should be omitted.

81. While section 35(c) deals with the consequences which will follow from the default of the purchaser or lessee to comply with the terms of a decree for specific performance, there is no provision in the Act as to what would happen if the purchaser or lessee makes the payments due from him but the vendor or lessor does not

1. Fry, 6th Ed., pp. 546-7.

2. *Akshayalingam v. Avayambala & Ammal*, A.I.R. 1933 Mad. 386.

3. *Ramji v. China*, 82 I.C. 73; *Kurpol v. Shamrao*, A.I.R. 1923 Bom. 211.

4. Collett, Sp. Rel. Act, 3rd Ed., p. 277.

5. *Per Macleod C J. in Kurpal v. Shamrao*, 47 Bom. 589. (592).

6. Law of Specific Relief, 2nd Ed., pp. 468-70.

7. S. 26, App. I.

comply with the decree by executing a conveyance or how the purchaser or lessee should obtain possession of the property. At present, the latter contingency is dealt with in proceedings for the execution of the decree. But, if in the former case, the vendor or lessor may obtain relief by way of rescission in the same suit, there is no reason why the other party may not have his reliefs against the vendor or lessor in the suit itself, inasmuch as the principle of avoidance of multiplicity of proceedings is equally applicable to both cases.

We have already provided¹ that consequential reliefs like possession or partition can be claimed in the suit for specific performance itself and included in the decree. We are now speaking of the enforcement of such reliefs included in the decree which are at present available only by executing the decree, in separate execution proceedings..

We recommend² that complete relief in terms of the decree in a suit for specific performance shall be available by application in the suit itself, without having to resort to separate execution proceedings and that appropriate provisions should be made in the Code of Civil Procedure enabling such applications to be made and orders thereon and also for appeals.

82. There are certain well-known limitations to the equitable right to rescind which are not incorporated into the existing section 35, but which have been applied by our Courts, on general considerations. For the sake of clarity and comprehensiveness, we may codify and include these principles in section 35, taking care not to make the propositions rigid so as to restrict the powers of the Courts to do justice. The Court may refuse to rescind a contract in any of the following cases:

- (a) Where the plaintiff has elected, whether expressly or impliedly, to abide by the contract³;
- (b) Where owing to the change of circumstances which has taken place since the making of the contract (not due to any act of the defendant

1. S. 19 of App. I.

2. Cf. s. 26 (3) of App. I.

3. Fry, 6th Ed., p. 348; *Clough v. L.N.W. Ry., Co.*, (1871) L.R. 7 Ex. 26 (34); *Rangaswami Gounden v. Nathiappa Gounden*, (1918) 42 Mad. 523 (538) P.C.; *Ramgowda v. Bhausaheb*, (1927) 52 Bom. 1 P.C.

himself) the parties cannot be substantially restored to the position in which they stood when the contract was made¹;

- (c) Where the contract is of such a nature that it is not severable² and a part thereof is sought to be rescinded;
- (d) Where third parties have, during the subsistence of the contract, *bona fide* acquired rights under it, without notice of the facts which make the contract liable to be rescinded³.

It is proposed that the above propositions be included in a new sub-section to section 35.

83. The requirement of 'writing' at the beginning of section 35 has long been omitted by the Transfer of Property Act, 1882, as regards the territories where that Act is in force. We have made this clear by inserting an Explanation at the end of the section.

84. Section 36 has been rightly criticised by Pollock Sec. 36. and Mulla⁴, as being in conflict with section 22 of the Contract Act, in these words—

"It is difficult to reconcile the language either with sound principle or with the terms of I.C.A., section 22. Mistake may prevent any real agreement from being formed; we are not aware of any case in which, on the ground of 'mere mistake', a contract is only voidable.....".

We recommend that section 36 be omitted.

85. No change is considered necessary in section 37.

Sec. 37.

86. The second part of section 64 of the Contract Act deals with another corollary which follows from the same principle as underlies section 38 of the Specific Relief Act, namely, "he who seeks equity must do equity". While section 38 of the Specific Relief Act enjoins the Court, while decreeing rescission, to direct the plaintiff to make any compensation to the defendant which justice may require, the second part of section 64 of the Contract Act enjoins the party who rescinds to restore any benefit which he may have received from the defendant under

Sec. 38.

1. Fry, pp. 346-352; *Hardei v. Bhagwan Singh*, 24 C.W.N. 105.

2. *Ohid v. Dorshu*, A.I.R. 1926 Cal. 959; *Inder v. Campbell*, 7 Cal. 474.

3. Fry, 6th Ed., p. 348; *Clough v. L.N.W. Ry. Co.* (1871) L.R. 7 Ex. 26 (35).

4. Specific Relief Act, 8th Ed., p. 836.

the contract. It is desirable that the same equitable principle should also be included in section 38, so that while decreeing rescission the Court may direct not only payment of compensation to the defendant (for instance, for improvements made by him on the property) but also restoration of any benefit received by the plaintiff under the contract¹.

We suggest that section 38 be amended accordingly.

Secs.39-40.
Sec. 41.

87. No change is recommended in sections 39 and 40.

88. We recommend that in section 41, the obligation to restore any benefit obtained under the instrument in question should be provided for, for the reasons we have already given in connection with section 38 [Para. 86, *ante*].

89. Under sections 38 and 41, a plaintiff who obtains relief on the ground that a contract to which he was a party is void or voidable, may be required by the Court to make compensation to the defendant. To this we have added the obligation of restoring any benefit which the plaintiff may have obtained under the instrument.

The question is whether the equitable principle should not similarly apply in favour of the plaintiff in a case where the defendant successfully resists the suit of the plaintiff on the ground (a) that the instrument is void or (b) that it is voidable and he has avoided it.

It may be pointed out, at the outset, that though the above sections of the Specific Relief Act and section 19A of the Contract Act provide the equitable relief only to defendant in the suit, section 65 of the Contract Act enables the relief to be awarded against 'any person'. The Privy Council² applied this section to give relief to a mortgagee, who had brought a suit on his mortgage, to recover the amount lent by him under the mortgage, with compound interest. The principle followed by the Privy Council was explained very clearly in a subsequent case arising out of the same transaction³—

"A defendant who when sued for money lent pleads that the contract was void can hardly regard with surprise a demand that he restore what he received thereunder."

1. *Lodge v. National Union Investment Co.*, (1907) 1 Ch. 300.
(*Cf. Nagappa v. Brahadambal*, 39 C.W.N. 709 P.C.)

2. *Nisar Ahmad v. Mohan Manucha*, A.I.R. 1940 P.C. 204.

3. *Mohan Manucha v. Manzoor Ahmad*, A.I.R. 1943 P.C. 29(34).

A further question which arises is whether the same principle should be made applicable to the case of voidable contracts. The modern principle of unjust enrichment does not make any distinction between void and voidable contracts. There is an *obiter dictum* of the Privy Council¹ to the effect that section 65 of the Contract Act extends also to voidable contracts.

As however section 65 uses the word 'void' and the observation of the Privy Council is in the nature of an *obiter dictum*, we propose, by way of abundant caution, that the principle underlying section 65 should be expressly made applicable to avoidable contracts, where the defendant relies on the voidability of the contract.

A specific provision to this effect may be added at the end of the Chapter on Cancellation [vide s. 36(1) of App.I].

90. Though section 65 of the Contract Act applies in terms to void contracts, the Privy Council has held² that that section has no application to contracts entered into by parties who were not competent to enter into any contract, and this view has been followed by the High Courts³.

As to section 41 of the Specific Relief Act, the consensus of opinion is that it applies where the minor is the plaintiff and seeks to set aside a transaction on the ground of his minority or asks for other relief on the footing that the transaction is a nullity⁴.

But as regards the application of section 41 as against a minor defendant, there is a sharp difference of opinion between the Lahore⁵ High Court on the one hand and the Allahabad⁶ and Andhra⁷ High Courts on the other. According to the Lahore High Court⁶, the equitable principle underlying the section should be equally applicable to the plaintiff and the defendant, and that, accordingly, when a minor enters into a contract on a false representation as to his age, and in a suit on the contract refuses to perform it on the ground of his minority, he must restore the proprietary or pecuniary benefit derived by him from the

1. *Sitgar Prasad v. Har Narain*, A.I.R. 1932 P.C. 89 (91).

2. *Mohori Bibee v. Dharmadas*, (1903) 30 Cal. 539 P.C.

3. *Ajudhia v. Chandan*, A.I.R. 1937 All. 610(612-4) F.B.; *Tikkilal v. Komal*, I.L.R. (1940) Nag. 632; *Punjabai v. Bhagvandas*, A.I.R. 1929 Bom. 89.

4. *Andraswami v. Narayanaswami*, A.I.R. 1930; Mad. 945; *Mahadeo v. Nana Baraiji*, A.I.R. 1946 Nag. 350.

5. *Khan Gul v. Lakh Singh*, A.I.R. 1928 Lah. 609 (617-8) F.B.

6. *Ajudhia v. Chandan*, A.I.R. 1937 All. 610 (618) F.B.

7. *Lutch Arao v. Bhimayya*, A.I.R. (1956) Andhra 182.

contract, whether he is the plaintiff or the defendant in the suit.

In other words, according to the Lahore High Court, the minor defendant should be bound not only to restore the property, if any, but also the monetary consideration obtained under the contract.

Sulaiman, C. J., in the Allahabad case¹, was prepared to accept this principle so far as restoration of specific property was concerned, but not to the extent of repayment of the pecuniary benefit, for that, according to him, "would be tantamount to enforcing the minor's pecuniary liability under the contract which is void²." This view has been followed by the Andhra High Court³.

Having considered the rival points of view we are inclined to prefer the view of Shadi Lal, C. J., in the Lahore case⁴. We have already recommended the acceptance of the doctrine of unjust enrichment⁵. According to that doctrine, the obligation to restore an unjust benefit should not depend upon the mere accident of a person coming before the Court as a plaintiff or defendant. We also agree with the view that restoration of *status quo ante* would not amount to the enforcement of the void contract against the defendant. The principle applicable to a minor will also apply to the case of a person of unsound mind.

We recommend, therefore, that a sub-section should be included in the new provision suggested by us⁶ to the effect that when a defendant successfully resists a suit on the ground that the contract is void, owing to his incapacity at the time of the contract, he must restore any benefit, whether proprietary or monetary, which he has actually received under the contract. But no question of liability to make any compensation, would arise in such a case.

Sec. 42.

91. We are of the opinion that in view of the development of this highly efficacious remedy both in *England* and in the *U.S.A.*, the scope of section 42 of our Act requires to be enlarged. The increasing importance of this remedy

1. *Ajudhia v. Chandan*, A.I.R. 1937 All. 610 (618) F.B.

2. *Ajudhia v. Chandan*, A.I.R. 1937 All. 610 (617) F.B.

3. *Lutcharao v. Bhimayya*, A.I.R. (1956) Andhra 182 (187).

4. *Khan Gul v. Lakha Singh*, A.I.R. 1928 Lah. 609 F. B.

5. *Vide* pp. 7-9 of our Report on the Limitation Act [Third Report of the Law Commission].

6. S. 36 of App. I.

in modern times is best expressed in the following words of Prof. Jennings. "The declaratory judgment is the symbol of twentieth century conception of law".

92. The first point on which our law differs from the present-day English and American law is that a mere declaration is not available where further relief is not asked for, the plaintiff being able to claim it.

In *England* 0.25 r.5 of the R.S.C. provides—

"No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not."

Similarly, the Federal Act and the Uniform Declaratory Judgments law in the U.S.A. empower courts to declare rights, status and other legal relations, whether or not further relief is or could be claimed.

In the U.S.A., the provision relating to further relief is an enabling provision². It is left to the option of the plaintiff whether he should ask for further relief in the declaratory suit itself or reserve it for a separate action.

As has been observed by American writers a simple declaratory decree without further relief, where it has to be sought for, is not necessarily useless, for, "this possibility of further relief gives, in practice, an immediate coercive effect to the declaration itself"³. If the defendant voluntarily complies with the declaratory decree by giving up his unlawful interest, the parties need not incur further expense in litigation concerning consequential relief. This would particularly be the case where the defendant is a responsible person or some public body or the State itself. In such cases, it can hardly be presumed that the defendant would not set matters right as soon as a declaration is made by the Court and that some coercive decree from the Court should still be necessary⁴.

1. Jennings, *Declaratory Judgments Against Public Authorities*, (1932) 41 *Yale Law Journal*, p. 407 (416).

2. 62 *Harvard Law Review*, p. 826.

3. *Ibid.*, pp. 788-789.

4. (1955) 18 *Modern Law Review*, p. 138.

But the Proviso to section 42 of our Act expressly prohibits such a decree where the plaintiff, being able to seek further relief, has omitted to do so.

It is to be noted that the Proviso marks a retrograde step in the development of our law, for, at a very early stage, it had been provided in section 29 of Act VI of 1854 and, then, in section 15 of the Code of Civil Procedure of 1859 that—

“No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby and it shall be lawful for the civil courts to make binding declarations of right without granting consequential relief.”

The Proviso was introduced by the Specific Relief Act with the object of preventing multiplicity of proceedings¹. The Proviso has, however, given rise to a mass of case-law as to what is ‘further relief’² and whether ‘further relief’ is such relief as could be sought for in the suit in which or in the court before which the declaration is sought. It leads to injustice in many cases and it only results in an addition to the revenue to a certain extent.

We cannot, however, adopt the American provisions in their entirety by reason of the fact that, we have, in our Civil Procedure Code, a provision in Order II, r. 2, which is salutary and which has been accepted in our country, without any criticism, for a fairly long time. Sub-clause (3) of that rule provides that if a person is entitled to more than one relief in respect of the same cause of action, he may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for any of such reliefs, he shall not afterwards sue for the relief so omitted. Hence, if the plaintiff sues merely for a declaration in respect of a present right and omits other reliefs to which he is entitled in respect of the same cause of action, he will be debarred from suing for it. The expression “able to seek” in the Proviso to section 42 has however a larger imports and includes not only the reliefs which arise out of the same cause of action but also those which would follow from the declaration sought by the plaintiff. In other

1. *Kombi v. Aundi*, (1890) 13 Mad. 75, per Muthuswami Iyer J. at p. 78.

2. In some cases (e.g., *Midnapore Zemindary Co. Ltd. v. Secretary of State* [(1917) 44 Cal. 352,] it has been held that a second declaration asked on the basis of the first declaration was a further relief [contra *Tewary v. Bhupat*, (1919) 50 I.C. 298 Pat].

words, the 'further relief' referred to in the Proviso to section 42 includes "such relief as he would be in a position to claim from the defendant in an ordinary suit by virtue of the title which he seeks to establish and of which he prays for a declaration¹."

Our intention is not to affect the principle of Order II, r. 2 of the Code in cases where it is properly attracted except as regards suits for declaration as to the validity or the invalidity of statutes.

This object will be achieved if we omit the Proviso to section 42 and make the first paragraph of the section subject to the provisions of Order II, r. 2.

93. Under the existing law, a declaratory decree can be obtained, apart from cases involving a legal character, only in respect of a proprietary right. But there is no reason, except an apprehension as to multiplicity of declaratory suits, why this beneficial remedy should not extend to all legal rights.

In the *United States*, both in the Federal and Uniform laws, the word "right" alone is used, so that a party may obtain a declaration as to any legal rights which, of course, mean justiciable rights². The word 'right' has been interpreted to include 'liability' also, so that actions have been entertained against the Government and other public bodies, to determine their liability³, duty or power⁴. Right also includes immunity, e.g., that a statute is not applicable to the plaintiff⁵. Since the word 'right' is not confined to proprietary right, the Courts have had no difficulty in making a declaration as to a contractual right⁵ or a right to practise a profession or the like⁵.

On the other hand, the first paragraph of section 42 of the Specific Relief Act speaks only of a 'right as to any property', there has been a prolonged controversy as to whether section 42 is exhaustive or declaratory actions lie in cases not covered by it, and whether any particular right is a right as to property or not. Declarations under

1. *Abdulkadar v. Mahomed*, (1892) 15 Mad. 15 at p. 18.

2. Cf. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (325); 80 L. Ed. 688 at p. 699.

3. Cf. 62 Harbard Law Review, p. 875-6.

4. *Ibid.*, p. 873.

5. *Ibid.*, pp. 848-9.

section 42 have been refused in regard to pecuniary¹ and contractual rights.²

In our view, if the relief is extended to legal rights of all kinds, it might, instead of multiplying litigation, lead to its reduction. Doubtless, a large number of persons would give up a contest as soon as the dispute as to the existence of the right is settled by a Court of law. Moreover, certainty and security with respect to ordinary legal rights are as important as in the case of proprietary rights. The purpose of laws similar to section 42 is, as the Uniform Declaratory Judgments Act puts it, to afford relief from uncertainty and insecurity with respect to rights.

We, therefore, recommend that the word 'as to any property' in the first paragraph of section 42 be omitted.

94. Section 42 is also deficient in its omission to make any express provision for a declaration as to the constitutionality of a law.

Under the Constitution, the Supreme Court has decreed a declaratory suit on appeal³ and declared the impugned law to be unconstitutional. The basis of the declaratory action was, of course, not determined in this case, but since the Court held that the plaintiff's fundamental right under Article 31 had been violated, the suit fell clearly within the language of section 42 because a 'right as to property' had been denied. The Court observed⁴ that only a person "whose own right or interest" had been violated or threatened could impugn the law.

On principle, there is no reason why a person whose rights are affected or likely to be affected by an unconstitutional statute or bye-law should not be entitled to obtain a declaration from the Court that it is invalid. Even under the existing law, it has been held⁵ that when a person's rights are affected by an *ultra vires* governmental act, he need not ask for any relief other than a declaration that the executive act or order is null and void. The State being the defendant, it is presumed that once the order is declared null and void, the plaintiff's rights will be restored. We think this principle should apply with a

1. *Gopaldas v. Mul Raj*, A.I.R. 1937 Lah. 389.

2. *Ramakrishna v. Narayana*, (1914) 39 Mad. 80.

3. *Dwarkadas v. Sholapur Spinning Co.*, (1954) S.C.R. 674.

4. *Dwarkadas v. Sholapur Spinning Co.* (1954) S.C.R. 674 72/-22.

5. *Fischer v. Secy. of State*, (1898) 22 Mad., 270 P.C.

greater force where the law under which the executive has purported to act, is itself unconstitutional and void. Thus, if an individual's possession has been disturbed under an unconstitutional statute, he may ask for a declaration that the statute is invalid and has not affected his right, without specifically asking for the restoration of possession.

We propose to insert a sub-section in section 42 embodying the foregoing principle. We want to make it clear that a plaintiff who seeks to have a law declared invalid need not seek any further relief than that the law is invalid and that his right is not affected by it.

In order to prevent frivolous actions, we have provided that no suit for declaring the constitutionality of a law will lie unless the plaintiff's right or legal character which depends on the validity or invalidity of such law has been invaded or threatened to be invaded by the defendant.

95. No change is necessary in section 43.

Sec. 43.

96. The mode and effect of appointment of a Receiver, his rights, duties, powers and liabilities are regulated by 0-40, rr. 1-5 of the C.P. Code. While Order 40, r. 1 of the Code provides for appointment of a Receiver both before and after the decree, section 44 of the Specific Relief Act deals only with the appointment of a Receiver before decree.

Sec. 44.

We are of the view that the section serves no useful purpose and, therefore, recommend its omission.

97. Chapter VIII (sections 45—51) provides for an order in the nature of *mandamus*. In view of Art. 226 of the Constitution, there would appear to be no need for retaining this Chapter. The scope of section 45 of the Act is narrower than that of Art. 226. In fact, clauses (f) and (g) of the Proviso to section 45 are inconsistent with Art. 226 and section 50 which was substituted by the Adaptation Order, 1950, practically renders these clauses nugatory.

It was urged that while evidence can be taken in a proceeding under section 45, the High Courts while exercising jurisdiction under Art. 226 are generally averse to investigating disputed facts by taking evidence. But there is nothing in Art. 226 to prevent their doing so. In fact, we find that just as the Rules framed under section 45 confer discretionary power upon the High Court to take evidence,

so the Rules framed under Art. 226 by a number of High Courts, such as those of Orissa, Mysore, Madhya Pradesh, Allahabad, Rajasthan, Bombay and Assam, confer similar discretionary power on the court to take evidence, oral or documentary. For instance, Rule 7 of the Rules framed by the Orissa High Court says—

“All questions arising for determination under this chapter shall ordinarily be decided upon affidavits, but the Court may direct that such questions as it may consider necessary be decided on such other evidence as it may deem fit. Where the Court orders that certain matters in controversy between the parties shall be decided on such evidence, the procedure prescribed in the Code of Civil Procedure, 1908, for the trial of suits shall, so far as applicable, be followed.”

We recommend that sections 45—51 be omitted, and questions such as that of taking evidence, should be left to the rule-making power of the High Courts, and that Rules similar to the aforesaid Rule of the Orissa High Court may be framed by those High Courts which have not made similar rules.

Secs. 52-53. 98. No change is necessary in sections 52 and 53.

Sec. 54. 99. The use of the word ‘applicant’ in the first paragraph of section 54 is not appropriate, for, a perpetual injunction cannot be had upon an application as distinguished from a suit. Later in the section, the word ‘plaintiff’ is used. Accordingly, the word ‘applicant’ in the section should be replaced by the word ‘plaintiff’.

Cl. (d). 100. Clause (d) of section 54 should be omitted for the reasons for which we have recommended the omission of clause (d) of section 12 [Para 22, *ante.*].

Sec. 55. 101. No change is considered necessary in section 55.

102. In England, it is well-settled that since the passing of the Judicature Act, 1873, the High Court can, in an action for injunction, exercise its discretion to award damages either in addition to, or in substitution for, an injunction, whether or not damages have also been specifically claimed¹.

1. *Vide* Halsbury's Laws of England, Second Edition, Vol. 18, Para. 3
Page 23.

The same view has been taken in India¹ even though the principle adopted in section 19 was not extended by the framers of the Act to an action for an injunction.

In the circumstances, it is advisable to make a specific provision in the Act for this purpose. We recommend that a new provision on the lines of section 19 of the Act be added, to cover cases arising under sections 54 and 55 of the Specific Relief Act.

103. The expression used in clauses (a), (b) and (e) of section 56 is "to stay" "proceedings". This has led to Sec. 56. a controversy as to whether an injunction can be directed to the Court itself before which the proceeding is pending. We agree with the view taken by the Patna High Court², Cls.(a)-(b), that an injunction is a remedy *in personam* which is directed against the litigant and not against the Court.

We recommend that suitable changes be made in clauses (a), (b) and (e) of section 56, to remove doubts on this point.

104. Clause (d) may be omitted. The first part of the Cl.(d). clause, referring to any Government department in India, is inconsistent with the principle embodied in the second Proviso to Article 361(1) of our Constitution. The second part is unnecessary because the immunity of a foreign sovereign in respect of his sovereign acts is well accepted.

105. No alteration is necessary in the remaining clauses of section 56, except verbal changes.

106. It has been suggested to us that section 57, which Sec. 57. is based on the decision in *Lumley v. Wagner*³, requires to be modified in view of the subsequent decisions in England

Upon a careful examination of the authorities, however, we find that the actual decision in that case has not been the subject of adverse comment in the later case. What has been objected to is the extension of the principle involved in that case.

It is to be noted that in *Lumley's* case⁴, there was, in fact, an express negative covenant not to sing at

1. *Kaliandas v. A.I.R. 1954 Sau. 139 ; Callianji Hiralal v. Narsi*, 19 Bom. 764; *Kallidas v. Tulsi*, 23 Bom. 786.

2. *Rameshwar v. Baldeo*, A.I.R. 1938 Pat. 606.

3. (1852) 91 R.R. 193 ; 42 E.R. 687.

4. *Lumley v. Wagner*, (1852) 91 R.R. 193 ; 42 E.R. 687.

any other theatre; and so far as express negative covenants are concerned, there is no difference of opinion that the Court will, as a rule enforce them by injunction.¹

The controversy has arisen on the question whether a negative covenant should, in any circumstances, be inferred from an affirmative agreement. While granting the injunction in *Lumley's* case², Lord St. Leonards suggested that a negative covenant not to sing elsewhere would have been implied, in the circumstances of the case, even had there been no such express covenant:

"....the engagement to performat one theatre must necessarily exclude the right to perform at the same time at another theatre..... I am of opinion that if she had attempted, even in the absence of any negative stipulation, to perform at another theatre, she would have broken the spirit and true meaning of the contract as much as she would now do with reference to the contract into which she had actually entered³".

The above observation was, followed in subsequent cases as implying negative covenants liberally almost in every case and in *Montague v. Flockton*⁴, *Malins V. C.* observed: "A negative covenant is as necessarily implied as if it had been plainly expressed".

The decision in *Lumley v. Wagner*² did not lay down that a negative covenant must be implied in every case, of an affirmative covenant. Against this wide extension of the doctrine laid down in *Lumley's* case protests were raised in later cases like *Wolverhampton & Walsall Rly. Co. v. L. & N.W. Rly. Co.*⁴ and *Whitwood Chemical Co. v. Hardman*⁵. In the former case, Lord Selbourne laid down the modern rule that whether a negative covenant fit to be enforced by an injunction would be implied in a given case was a question of substance and not of form. The later case of *Mortimer v. Beckett*⁶ says that an injunction will not be granted unless the negative stipulation is

1. Kerr on Injunctions, 6th Ed., pp. 422-3.

2. *Lumley v. Wagner*, (1852) 91 R.R. 193; 42 E.R. 687, 693.

3. *Montague v. Flockton*, (1873) 16 Eq. 189 ; 201.

4. (1873) 16 Eq. 433.

5. (1891) 2 Ch. 416.

6. (1920) 1 Ch. 571.

independent of the positive part. The present position, in short, is that the doctrine of implied covenants will be applied with scrupulous care¹.

But section 57 of the Act does not in any way suggest that a negative covenant would be inferred from every affirmative covenant. It simply says that a negative agreement may be either express or implied. The circumstances in which such an implication should be made is left entirely to the discretion of the Court. Banerji² rightly observes:

"As the jurisdiction is conferred by Statute in India, there is no ground to treat it as exceptional or anomalous. It is not a technical or artificial rule which the Indian Statute Book professes to enforce, it looks to the substance and not to the form of the contract.....".

We do not wish to take away this discretion of the Court, and any misunderstanding that might have arisen by reason of some of the illustrations to the section will now disappear as we have recommended their omission. There may be cases where a negative covenant can be properly implied and in such cases, it should not be open to the defendant, to go back on his undertaking to the plaintiff. In the words of Lord St. Leonards³, in such cases the Court should operate "to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreements; and it will not suffer them to depart from their contracts at their pleasure.....".

We are also in agreement with Maclean, C. J., of the Calcutta High Court⁴ that if upon a consideration of all the circumstances, the Court finds that an injunction should issue, it is no argument to say that the defendant would then starve. As Maclean, C. J., put it, "he (the defendant) ought to have thought of that before he deliberately broke his contract".

In our opinion, the section requires no change.

107. With a view to presenting a clear picture of the recommendations made by us in this Report we have

1. Halsbury, 2nd Ed., Vol. 18 para. 87.

2. Law of Specific Relief, 2nd Ed., p. 626.

3. *Lumley v. Wagner*, (1852) 97 R.R. 193; 42 E.R. 786 at 693.

4. *Burn & Co. v. McDonald*, (1908) 36 Cal. 354 (365).

made alterations giving effect to them in the text of the existing Act as shown in Appendix I.

Appendix II contains two comparative Tables—Table A showing the sections in the existing Act with the corresponding sections in Appendix I, and Table B showing the sections in Appendix I and the corresponding sections in the existing Act.

Appendix III contains the suggestions made by us in respect of other Acts

M. C. SETALVAD,
(Chairman).

M. C. CHAGLA,
K. N. WANCHOO,
P. SATYANARAYANA RAO,
N. C. SEN GUPTA*,
V. K. T. CHARI,
D. NARASA RAJU,
S. M. SIKRI,
G. S. PATHAK,
G. N. JOSHI,
N. A. PALKHIVALA,

(Members).

K. SIRINIVASAN,
DURGA DAS BASU,
Joint Secretaries.

NEW DELHI:

July 19, 1958.

*Dr. Sen Gupta has signed the report, subject to the Note appended at the end.

APPENDIX I

Proposals as inserted in the body of the existing Act.

(This is, however, not to be treated as a Draft Bill).

[Corresponding sections of the existing Act are noted in the margin, and additions to the provisions of the existing Act are shown in the text in italics, wherever possible.]

THE SPECIFIC RELIEF ACT, 19.....

PART I

PRELIMINARY

(1) This Act may be called the Specific Relief Act,.....

(1) This Act may be called the Specific Act,..... [Sec. 1.]

(2) It extends to the whole of India except the State of Jammu and Kashmir.....

2. Definitions.

In this Act, unless the context otherwise requires— [Sec. 3.]

- (a) "obligation" includes every duty enforceable by law;
- (b) "settlement" means any instrument (other than a will or codicil as defined by the Indian Succession Act, 1925), whereby the destination or ^{39 of 1925} devolution of successive interests in movable or immovable property is disposed of or is agreed to be disposed of;
- (c) "trust" includes a trust as defined in section 3 of the Indian Trusts Act, 1882, and an obligation ^{2 of 1882.} in the nature of a trust arising under Chapter IX of that Act;
- (d) "trustee" includes every person holding property in trust; and
- (e) all other words and expressions used but not defined in this Act, and defined in the Indian

[9 of 1872]

Contract Act, 1872, have the meanings respectively assigned to them in that Act.

3. *Savings.*

[Sec. 4]

Except as otherwise expressly provided, nothing in this Act shall be deemed—

* * *

[Sec. 4(b)]

(a) to deprive any person of any right to relief, other than specific performance, which he may have under any contract; or

[Sec. 4 (c)]
16 of 1908.

(b) to affect the operation of the Indian Registration Act, 1908, on documents.

4. *Specific relief granted only to enforce civil rights.*

[Sec. 7]

Specific relief under this Act can be granted only for the enforcement of individual civil rights and not for the mere purpose of enforcing a penal law.

PART II

SPECIFIC RELIEF

CHAPTER I.

RECOVERING POSSESSION OF PROPERTY

Sec. 8

5. *Recovery of specific immovable property.*

A person entitled to the possession of specific immovable property may recover it in the manner provided by the Code of Civil Procedure, 1908.

5 of 1908

6. *Recovery of specific movable property.*

Sec. 10

A person entitled to the possession of specific movable property may recover the same in the manner provided by the Code of Civil Procedure, 1908.

5 of 1908

Explanation 1.—A trustee may sue under this section for the possession of property to the beneficial interest in which the person for whom he is trustee is entitled.

Explanation 2.—A special or temporary right to the present possession of property is sufficient to support a suit under this section.

Sec. 11

7. *Liability of person in possession, not as owner, to deliver to person entitled to immediate possession.*

Any person having the possession or control of a particular article of movable property, of which he is not the owner, may be compelled specifically to deliver it to the

person entitled to its immediate possession, in any of the following cases:—

- (a) when the thing claimed is held by the defendant as the agent or trustee of the plaintiff;
- (b) when compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed;
- (c) when it would be extremely difficult to ascertain the actual damage caused by its loss;
- (d) when the possession of the thing claimed has been wrongfully transferred from the plaintiff.

Explanation.—The burden of proving that the case does not fall under clause (b) or (c) shall be on the defendant.

CHAPTER II

SPECIFIC PERFORMANCE OF CONTRACTS

8. *Defence relating to the existence or validity of the [New] contract.*

All defences open under the law relating to contracts to a person contesting the existence, validity or enforceability of a contract shall be open to him under this Act.

9. *Jurisdiction to grant specific performance.*

[Sec. 12.]

Except as otherwise provided in this Chapter, the specific performance of any contract may in the discretion of the court be enforced—

* * *

(a) When there exists no standard for ascertaining [Sec. 12(b)] the actual damage caused by non-performance of the act agreed to be done; or

(b) when the act agreed to be done is such that [Sec. 12(c)] pecuniary compensation for its non-performance would not afford adequate relief.

* * *

10. *Presumption regarding contracts for transfer of immovable property.* [Sec. 12,] [Expl.]

Until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money..... [Sec. 12,] [Expl.]

11. *Presumption regarding contracts for transfer of movable property.*

Except in the following cases, the court shall presume that the breach of a contract to transfer..... movable property can be adequately relieved by compensation in money..... :—

[New] (a) *where the property is not an ordinary article of commerce and is unique or of special value or interest to the plaintiff;*
 (b) *where the property is held by the defendant as agent or trustee of the plaintiff;*
 (c) *where the property consists of goods not easily procurable in the market.*

12. *Contracts connected with trust.*

[Sec. 12(a)] (1) *Except as otherwise provided in this Act, specific performance of a contract may in the discretion of the court be enforced when the act agreed to be done is in the performance, wholly or partly, of a trust.*

[Sec. 21(e).] (2) *A contract made by a trustee either in excess of his powers or in breach of his trust cannot be specifically enforced.*

[Sec. 21.] 13. *Contracts not specifically enforceable.*

(1) *The following contracts cannot be specifically enforced:—*

[Sec. 21 (a)] (a) *A contract for the non-performance of which compensation in money is an adequate relief;*

Notwithstanding anything contained in this clause, the court may enforce specific performance of a contract in the following cases:—

(i) *where the money was advanced in whole or in part on a promise to give security, and the lender has advanced the whole of the loan or has advanced part of it and is ready and willing to advance the balance, and sues to obtain specific performance of the contract, the defendant having failed to repay the loan;*
 (ii) *where it is a contract with a company to take up and pay for any debentures of the company.*

[Sec. 21(b).] (b) *a contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature, is such, that the court cannot enforce specific performance of its material terms;*

(c) a contract which is in its nature determinable: [Sec. 21(d.)]

Notwithstanding anything contained in this clause, the court may—

- (i) under the execution of a formal deed of partnership where the parties have commenced to carry on the business of the partnership;
- (ii) enforce the specific performance of a contract for the purchase of the share of a partner;

* * * * *

(d) a contract the performance of which involves the [Sec. 21(g.)] performance of continuous acts which the Court cannot supervise:

Notwithstanding anything contained in this clause, the Court may enforce specific performance of a contract to build or execute other work on land, provided the following conditions are fulfilled—

- (i) the building or work to be executed under the contract is defined by the contract with particulars sufficiently precise to enable the court to determine the exact nature of the building or work;
- (ii) the plaintiff has a substantial interest in the performance of the contract of such a nature that compensation in money for non-performance thereof is not an adequate relief; and
- (iii) the defendant has under the contract obtained possession, in whole or in part, of the land on which the building or work is to be executed.

(2) Save as provided by the Arbitration Act, 1940, no [Sec. 21, contract to refer present or future differences to arbitration shall be specifically enforced, but if any person who [last para-
graph.] [10 of 1940.] has made such a contract (other than an arbitration agreement to which the provision of the said Act apply) and has refused to perform it sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

14. Specific performance of part of contract. [Sec. 17.]

(1) The court shall not direct the specific performance of a part of a contract except as provided by this section.

(2) Where a party to a contract is unable to perform [Sec. 14.] the whole of his part of it, but the part which must be left

unperformed bears only a small proportion to the whole in value, and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

[Sec. 15.]

(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed—

(a) *though admitting of compensation in money, forms a considerable portion of the whole, or*

(b) *does not admit of compensation in money, he is not entitled to obtain a decree for specific performance. But the court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform—*

(i) *the case referred to in clause (a) above, provided the plaintiff pays or has paid the consideration promised by him as proportionately abated and also relinquishes all claim to further performance and all right to compensation either for the deficiency or for the loss or damage sustained by him through the default of the defendant;*

(ii) *in the case referred to in clause (b) above, provided the plaintiff pays or has paid the consideration promised by him without any abatement and also relinquishes all claim to further performance and all right to compensation as specified in sub-clause (i).*

[Sec. 16.]

(4) When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part.

[Sec. 13.]

Explanation.—For the purposes of this section, a party to a contract shall be deemed to be unable to perform the whole of his part of it if a portion of its subject matter, existing at the date of the contract, has ceased to exist at the time of the performance.

15. *Purchaser's rights against vendor with no title or imperfect title.*

Where a person contracts to sell or let certain [Sec. 18] immovable property, *having no title or only an imperfect title thereto*, the purchaser or lessee (*subject to the other provisions of this Chapter*) has the following rights:—

- (a) if the vendor or lessor has subsequently to the contract acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest;
- (b) where the concurrence of other persons is necessary to validate the title and they are bound to concur at the vendor's or lessor's request, the purchaser or lessee may compel him to procure such concurrence, *and where a conveyance by other persons is necessary to validate the title and they are bound to convey at the vendor's or lessor's request, the purchaser or lessee may compel the vendor or lessor to procure such conveyance by such proceedings as may be necessary;*
- (c) where the vendor professes to sell unencumbered property, but the property is mortgaged for an amount not exceeding the purchase money and the vendor has in fact only a right to redeem it, the purchaser may compel him to redeem the mortgage *and to obtain a valid discharge, and, where necessary, also a valid conveyance from the mortgage;*
- (d) where the vendor or lessor sues for specific performance of the contract, and the suit is dismissed on the ground of his imperfect title *or want of title*, the defendant has a right to a return of his deposit (if any) with interest thereon, to his costs of the suit, and to a lien for such deposit, interest and costs on the interest of the vendor or lessor in the property agreed to be sold or let.

[Sec. 25.] 16. *Person contracting to sell without title not entitled to specific performance.*

A contract for the sale or letting of immovable property cannot be specifically enforced in favour of a vendor or lessor—

- (a) who, knowing himself not to have any title to the property, has contracted to sell or let the same;
- (b) who, though he entered into the contract believing that he had a good title to the property, cannot at the time fixed by the parties or by the court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt.

* * * * *

[New] 17. *Application of certain sections to contracts for sale or hire of movable property.*

The provisions of sections 15 and 16 as to contracts for the sale or letting of immovable property shall, mutatis mutandis, apply to contracts for the sale or hire of movable property.

[Sec. 19.] 18. *Power to award compensation in certain cases.*

(1) *Where any person suing for the specific performance of a contract.....also claims compensation for its breach, either in addition to or in substitution for such performance, the court, in determining such claim, shall be guided by the following principles:—*

(a) if.....the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly;

(b) if.....the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly;

(2) *Compensation for the breach of a contract, in addition to or in substitution for specific performance of the contract, shall not be awarded unless it has been*

specifically asked for; but the court shall at any stage grant leave to amend the plaint for including a prayer for such compensation on such terms as may be just.

(3) Compensation awarded under this section may be assessed according to the principles laid down in section 73 of the Indian Contract Act, 1872, and under such procedure as the Court may direct.

Explanation.—The circumstance that the contract has become incapable of specific performance does not preclude the court from exercising the jurisdiction conferred by this section.

19. *Power to grant relief for possession, partition, refund of earnest money etc.*

(1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908, any person ^[New] _{5 of 1908.} suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for—

- (a) possession, or partition and separate possession, in addition to such performance; or
- (b) any other relief to which he may be entitled, including refund of earnest money or deposit, in case his claim for specific performance is refused.

(2) If any such suit the court decrees specific performance and finds that the plaintiff is entitled to any of the reliefs mentioned in clause (a) of sub-section (1), it may also award him the same accordingly.

(3) If in any such suit the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to any of the reliefs mentioned in clause (b) of sub-section (1), it shall award him the same accordingly.

(4) Relief under clause (a) or (b) of sub-section (1) shall not be granted unless it has been specifically claimed: but the court shall at any stage grant leave to amend the plaint for including a prayer for such relief on such terms as may be just.

(5) The power to award relief under clause (b) of sub-section (1) is without prejudice to the power to award compensation under section 18.

20. *Liquidation of damages not a bar to specific performance.*

[Sec. 20.]

A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same, if the court finds from the terms of the contract and the attending circumstances that it was the intention of the parties that the sum was named only to secure performance of the contract and not as giving the party in default an option to pay money in lieu of performance:

Provided that the court, when enforcing specific performance, shall not also decree payment of the sum so named in the contract.

21. *Discretion as to decreeing specific performance.*

[Sec. 22.]

(1) The jurisdiction to decree specific performance is discretionary and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

(2) The following are cases in which the court may properly exercise a discretion not to decree specific performance:—

[Sec. 22-I.]

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or other circumstances under which the contract was made are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

[Sec. 22-II.]

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or

(c) where the defendant entered into the contract under circumstances which, though not rendering the contract voidable, make it inequitable to enforce specific performance.

Explanation 1.—The question of hardship is to be determined with reference to the circumstances existing

at the time of the contract except in the case of *hardship* which has resulted from the subsequent acts of the plaintiff.

Explanation 2.—Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b).

(3) The following is a case in which the court may [Sec. 22-III.] properly exercise a discretion to decree specific performance:—

Where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) *The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party.* [New]

22. Who may obtain specific performance.

Except as otherwise provided by this Chapter, the [Sec. 23 (a)] specific performance of a contract may be obtained—

- (a) by any party thereto;
- (b) by the representative-in-interest, or the principal, of any party thereto;

Provided that, where the learning, skill, solvency or any [Sec. 23(b)] personal quality of such party is a material ingredient in the contract or where the contract provides that the interest shall not be assigned, his representative-in-interest or his principal shall not be entitled to specific performance of the contract, unless *such party has already performed his part of the contract or the performance thereof by his representative-in-interest or principal has already been accepted by the other party;*

- (c) subject to the provisions of the Indian Contract Act, 1872, by a person who, though not a party [9 of 1872.] to the contract, is entitled to a benefit thereunder or has an interest therein;

* * * * *

- (d) when a... company has entered into a contract [Sec. 23 (g)] and subsequently becomes amalgamated with another... company, by the new company which arises out of such amalgamation;

[Sec. 23(h).] (e) when the promoters of a company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company, provided the company has accepted the contract and communicated such acceptance to the other party to the contract.

23. *Relief against parties and persons claiming under them by subsequent title.*

Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against—

[Sec. 27 (a)] (a) either party thereto;

[Sec. 27 (b)] (b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid the consideration in good faith and without notice of the original contract;

[Sec. 27 (c)] (c) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the other party to the contract; ..

[Sec. 27 (d)] (d) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of such amalgamation;

[Sec. 27 (e)] (e) when the promoters of a company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company, provided.....the company has accepted the contract and communicated such acceptance to the other party to the contract.....

24. *Personal bars to the relief.*

Specific performance of a contract cannot be enforced in favour of a person—

[Sec. 24 (a)] (a) who would not be entitled to recover compensation for its breach;

[Sec. 24 (b)] (b) who has become incapable of performing or violates any essential term of the contract that

on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with or in subversion of the relation intended to be established by the contract;

(c) who fails to aver and prove that he has performed, [New] or has been ready and willing from the date of the contract till the hearing of the suit to perform, the essential terms of the contract to be performed by him, except terms the performance of which has been waived by the defendant.

Explanation.—For the purposes of clause (c)—

- (i) it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money, except when so directed by the court;
- (ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

25. Non-enforcement except with variation.

Where a plaintiff seeks specific performance of a contract in writing, to which the defendant sets up a variation, the plaintiff cannot obtain the performance sought, except with the variation so set up, in the following cases, namely:—

- (a) where by fraud, mistake of fact or misrepresentation the written contract of which performance is sought, is in its terms or effect different from what the parties agreed to, or does not contain all the terms agreed to between the parties on the faith of which the defendant entered into the contract; [Sec. 26(a), (b), (c)]
- (b) where the object of the parties was to produce a certain legal result, which the contract as framed is not calculated to produce; [Sec. 26(d)]
- (c) where the parties have, subsequently to the execution of the contract, varied its terms. [Sec. 26 (e)]

26. Rescission of contracts for sale or lease on failure of performance by plaintiff.

[Sec. 35 (c),
part.]

5 of 1958.

[Sec. 35 (c),
part.]

[Sec. 35, 3rd
para.]

[Sec. 35, 2nd
para.]

[New.]

[New.]

(1) Where a decree for specific performance of a contract for the sale or lease of immovable property has been made, all subsequent proceedings hereafter mentioned in this section shall be taken only in the suit in which the decree is made, in the manner provided by the Code of Civil Procedure, 1908.

(2)If the purchaser or lessee does not, within the time allowed by the decree or extended by an order of the court made on the application of either party, pay the purchase-money or other sum which the court has ordered him to pay, the vendor or lessor may apply to have the contract rescinded and.....the court may, by order in the suit,.....rescind the contract, either so far as regards the party in default or altogether, as the justice of the case may require.

(3) Where a contract is rescinded under sub-section (2), the court—

(a) shall pass an order directing the purchaser or lessee, if he has obtained possession of the property under the contract, to restore such possession to the vendor or lessor, and may also pass an order for payment of the rents or profits which have accrued in respect of the property from the date on which the possession was so obtained by the purchaser or lessee until restoration of possession to the vendor or lessor, and

(b) may, if the justice of the case so requires, direct the vendor or lessor to refund any sum paid by the vendee or lessee as earnest money or deposit.

(4) If the purchaser or lessee complies, within the time mentioned in sub-section (2), with the terms of the decree referred to therein, the court may, by order in the suit, made on his application, award him such further relief as he may be entitled to, including, in appropriate cases,—

(a) execution of a proper conveyance or lease by the vendor or lessor;

(b) delivery of possession, or partition and separate possession, of the property on execution of the conveyance or lease.

(5) The costs of proceedings under this section shall be in the discretion of the court.

27. *Bar of suit for breach after dismissal.*

The dismissal of a suit for specific performance of a [Sec. 29.] contract or part thereof shall bar the plaintiff's right to sue for compensation for the breach of such contract or part, as the case may be, but shall not bar his right to sue for any other relief to which he may be entitled by reason of such breach.

28. *Application of preceding provisions to awards and testamentary directions to execute settlement.*

The provisions of this Chapter as to contracts shall, [Sec. 30.] mutatis mutandis, apply to awards to which the Arbitration Act, 1940, does not apply and to directions in a will ^{or of 1940.} or codicil to execute a particular settlement.

CHAPTER III

RECTIFICATION OF INSTRUMENTS

29. *When instruments may be rectified.*

(1) When, through fraud or a mutual mistake of the [Sec. 31.] parties, a contract or other instrument in writing (not being the articles of association of a company to which the Companies Act, 1956, applies) does not express their ^{real intention, then—} _{of 1956}

- (a) either party or his representative-in-interest may institute a suit to have the instrument rectified; or
- (b) the plaintiff may, in any suit in which any right under the instrument is in issue, ask for rectification of the instrument; or
- (c) a defendant in any such suit as is referred to in clause (b) may, in addition to any other defence that he may put forth, ask for rectification of the instrument.

(2) If, in any suit in which a contract or other instrument is sought to be rectified under clause (a), (b) or (c) of sub-section (1), the court finds that the contract or other instrument, through fraud or mistake in framing it, does not express the real intention of the parties....., the court may in its discretion direct rectification of the contract or other instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

(3) The court shall not, in any such suit, direct rectification of the contract or other instrument unless the same has been specifically asked for in the pleading of the party concerned; but the court shall at any stage grant leave to amend the pleading by asking for rectification on such terms as may be just.

[Sec. 34.] (4) A contract in writing may be first rectified, and then, if the plaintiff has so prayed in his plaint and the court thinks fit, specifically enforced.

CHAPTER IV RESCISSIION OF CONTRACTS

30. When rescission may be adjudged.

[Sec. 35
(a) (b).] (1) Any person interested in a contract.....may sue to have it rescinded, and such rescission may, subject to the provisions of sub-section (2), be adjudged by the court in any of the following cases, namely:—

- (a) where the contract is voidable or terminable by the plaintiff;
- (b) where the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff.

* * *

[New.] (2) The court may refuse to rescind the contract—

- (a) where the plaintiff has, expressly or impliedly, ratified the contract;
- (b) where, owing to the change of circumstances which has taken place since the making of the contract (not due to any act of the defendant himself), the parties cannot be substantially restored to the position in which they stood when the contract was made.
- (c) where third parties have, during the subsistence of the contract, acquired rights in good faith without notice and for value; or
- (d) where only a part of the contract is sought to be rescinded and such part is not severable from the rest of the contract.

[New] Explanation.—In this section, “contract” means a contract in writing, except in the territories to which the Transfer of Property Act, 1882, extends for the time being.

31. *Alternative prayer for rescission in a suit for specific performance.*

A plaintiff instituting a suit for the specific performance of a contract in writing may pray in the alternative that, if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled, and the court, if it refuses to enforce the contract specifically, may direct it to be rescinded and delivered up accordingly. [Sec. 37]

32. *The court may require a party rescinding to do equity.*

On adjudging the rescission of a contract, the court [Sec. 38] may require the party to whom such relief is granted, if he has received any benefit under the contract from the other party, to restore such benefit, so far as may be, to that party and to make any compensation to him which justice may require.

CHAPTER V

CANCELLATION OF INSTRUMENT

33. *When cancellation may be ordered.*

(1) Any person against whom a written instrument is [Sec. 39] void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable, and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

(2) If the instrument has been registered under the [16 of 1908] Indian Registration Act, 1908, the court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

34. *What instruments may be partially cancelled.*

[Sec. 40.]

Where an instrument is evidence of different rights or different obligations, the court may, in a proper case, cancel it in part and allow it to stand for the rest.

35. *Power to require party for whom instrument is cancelled to make compensation.*

On adjudging the cancellation of an instrument, the [Sec. 41] court may require the party to whom such relief is

granted, if he has received any benefit under the instrument from the other party, to restore such benefit, so far as may be, to that party and to make any compensation to the other which justice may require.

[New] 36. Power to require defendant to restore benefit when instrument is void or voidable.

(1) Where a defendant successfully resists any suit on the ground that the instrument sought to be enforced against him in the suit is voidable, the court may, if the defendant has received any benefit under the instrument from the other party, require him to restore such benefit, so far as may be, to that party, or to make compensation for it.

9 of 1872.

(2) Where a defendant successfully resists any suit on the ground that the agreement sought to be enforced against him in the suit is void by reason of his not having been competent to contract under section 11 of the Indian Contract Act, 1872, the court may, if the defendant has received any benefit under the agreement from the other party, require him to restore such benefit, so far as may be, that party, to the extent to which he or his estate has benefited thereby.

CHAPTER VI

DECLARATORY DECREES

37. Discretion of court as to declaration of status or rights

[Sec. 42]

(1) Any person entitled to any legal character, or..... right.....may institute a suit against any person denying or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled; and the plaintiff in such suit need not ask for any further relief, though he is able to seek such relief.

* * *

Explanation.—A trustee of property is a “person interested to deny” a title, adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.

[New]

(2) Without prejudice to the generality of the provisions of sub-section (1), any person entitled to any legal character or right, the existence, extent or nature of which depends on the validity or invalidity of any law,

may institute a suit against any person or authority (including, in appropriate cases, the Government) denying his title to such character or right or threatening to invade such right, for a declaration about the validity or invalidity of the law and about his legal character or right without asking for any further relief; and the court may, in its discretion, make therein such a declaration.

Explanation.—In this sub-section, “law” includes an enactment, ordinance, regulation, order, by-law, rule, scheme, notification or other instrument having or intended to have the force of law in the whole or in any part of the territory of India.

(3) The provisions of sub-section (1) shall, but the [New] provisions of sub-section (2) shall not, be subject to those of Rule 2 of Order II of the First Schedule to the Code of Civil Procedure, 1908. 5 of 1908.

38. *Effect of declaration.*

A declaration made under this Chapter is binding [Sec. 43] only on the parties to the suit, persons claiming through them respectively, and, where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees.

CHAPTER VII

INJUNCTIONS GENERALLY

39. *Preventive relief how granted.*

Preventive relief is granted at the discretion of the court by injunction temporary or perpetual. [Sec. 52]

40. *Temporary injunction.*

(1) Temporary injunctions are such as are to continue until a specified time, or until the further order of the court. They may be granted at any period of a suit, and [Sec. 53] are regulated by the Code of Civil Procedure, 1908.

(2) A perpetual injunction can only be granted by the 5 of 1908 decree made at the hearing and upon the merits of the suit; the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.

CHAPTER VIII

PERPETUAL INJUNCTIONS

41. *Perpetual injunction when granted.*

[Sec. 54]

(1) Subject to the other provisions contained in, or referred to by, this Chapter, a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the plaintiff, whether expressly or by implication.

(2) When such obligation arises from contract, the court shall be guided by the rules and provisions contained in Chapter II of this Part.

(3) When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the court may grant a perpetual injunction in the following cases, namely:—

(a) where the defendant is a trustee of the property for the plaintiff;

(b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;

(c) where the invasion is such that pecuniary compensation would not afford adequate relief;

* * * *

(d) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

Explanation.—For the purpose of this section a trademark is property.

42. *Mandatory injunction.*

[Sec. 55]

When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

43. *Damages in lieu of or in addition to injunction.*

[New]

(1) *In any suit in which the court has jurisdiction to grant an injunction under section 41 or 42, the court may, if it thinks fit, award damages to the plaintiff for any injury, either in addition to or in substitution for such injunction.*

(2) *No damages shall be awarded under this section unless specifically asked for.*

44. Injunction when refused.

An injunction cannot be granted—

- (a) to restrain persons from prosecuting a judicial [Sec. 56.] proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;
- (b) to restrain persons from instituting or prosecuting proceedings in any other court not subordinate to that from which the injunction is sought;
- (c) to restrain persons from applying to any legislative body;
- * * *
- (d) to restrain persons from instituting or prosecuting proceedings in any criminal matter;
- (e) to prevent the breach of a contract the performance of which would not be specifically enforced;
- (f) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance;
- (g) to prevent a continuing breach in which the plaintiff has acquiesced;
- (h) when equally efficacious relief can..... be obtained by any other usual mode of proceeding, except in case of breach of trust;
- (i) when the conduct of the plaintiff or his agents has been such as to disentitle him to the assistance of the court;
- (j) where the plaintiff has no personal interest in the matter.

45. Injunction to perform negative agreement.

Notwithstanding anything contained in clause (e) of [Sec. 57.] section 44, where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the

nagative agreement: provided that the plaintiff has not failed to perform the contract so far as it is binding on him.

PART III

MISCELLANEOUS

[New] 46. *Repeal.*

1 of 1877. *The Specific Relief Act, 1877, is hereby repealed.*



APPENDIX II

TABLE A

Showing the provisions in the existing Act and the corresponding provisions, if any in Appendix I.

Existing provision	Corresponding provision, if any, in Appendix I
I	2
Section 1	Section 1
Section 2—[Repealed]	. . . . .
Section 3	Section 2
Section 4 (a)	Omitted.
Section 4 (b)	Section 3 (a)
Section 4 (c)	Section 3 (b)
Section 5	Omitted.
Section 6	Omitted.
Section 7	Section 4
Section 8	Section 5
Section 9	Omitted.
Section 10	Section 6
Section 11	Section 7
Section 12 (a)	Section 12 (1)
Section 12 (b) & (c)	Section 9
Section 12 (d)	Omitted.
Section 12, Explanation	Sections 10 and 11
Section 13	Section 14, Explanation
Section 14	Section 14(2)
Section 15	Section 14(3)
Section 16	Section 14(4)
Section 17	Section 14(1)
Section 18	Section 15
Section 19	Section 18
Section 20	Section 20
Section 21 (a)	Section 13(1)(a)
Section 21 (b)	Section 13(1)(b)
Section 21 (c)	Omitted.
Section 21 (d)	Section 13(1)(c)
Section 21 (e)	Section 12(2)
Section 21 (f)	Omitted.
Section 21 (g)	Section 13(1)(d)
Section 21 (h)	Omitted.
Section 21, Last paragraph	Section 13 (2)
Section 22—First Paragraph	Section 21(1)
—Second paragraph I & II	Section 21(2)
—Third paragraph III	Section 21 (3)
Section 23 (a)	Section 22 (a)
,, 23 (b)	Section 22 (b)
,, 23 (c)	Section 22 (c)
,, 23 (d)	Omitted.
,, 23 (e)	Omitted.
,, 23 (f)	Omitted.
,, 23 (g)	Section 22 (d)
,, 23 (h)	Section 22 (e)

Section 24 (a)	.	.	.	.	.	Section 24 (a)
,, 24 (b)	.	.	.	.	.	Section 24 (b)
,, 24 (c)	.	.	.	.	.	Omitted.
,, 24 (d)	.	.	.	.	.	Omitted.
Section 25 (a)	.	.	.	.	.	Section 16(a)
,, 25 (b)	.	.	.	.	.	,, 16 (b)
,, 25 (c)	.	.	.	.	.	Omitted.
Section 26 (a) - (c)	.	.	.	.	.	Section 25 (a)
,, 26 (d)	.	.	.	.	.	,, 25 (b)
,, 26 (e)	.	.	.	.	.	,, 25 (c)
Section 27 (a)	.	.	.	.	.	Section 23 (a)
,, 27 (b)	.	.	.	.	.	,, 23 (b)
,, 27 (c)	.	.	.	.	.	,, 23 (c)
,, 27 (d)	.	.	.	.	.	,, 23 (d)
,, 27 (e)	.	.	.	.	.	,, 23 (e)
Section 27A	.	.	.	.	.	Omitted.
Section 28	.	.	.	.	.	Omitted.
Section 29	.	.	.	.	.	Section 27
Section 30	.	.	.	.	.	Section 28
Section 31	.	.	.	.	.	Section 29 (1) - (2)
Section 32	.	.	.	.	.	Omitted.
Section 33	.	.	.	.	.	Omitted.
Section 34	.	.	.	.	.	Section 29 (4)
Section 35 (a), (b)	.	.	.	.	.	Section 30(1)
Section 35 (c), part	.	.	.	.	.	Section 26(1)
Section 35 (c), part	.	.	.	.	.	Section 26 (2), part
,, 35 2nd paragraph	.	.	.	.	.	,, 26 (3) (a)
,, 35, 3rd paragraph	.	.	.	.	.	,, 26 (2), part
Section 36	.	.	.	.	.	Omitted.
Section 37	.	.	.	.	.	Section 31
Section 38	.	.	.	.	.	Section 32
Section 39	.	.	.	.	.	Section 33
Section 40	.	.	.	.	.	Section 34
Section 41	.	.	.	.	.	Section 35
Section 42, Para. 1	.	.	.	.	.	Section 37 (1)
,, 42, Proviso	.	.	.	.	.	Omitted.
,, 42, Expl.	.	.	.	.	.	Section 37(1), Expl.
Section 43	.	.	.	.	.	Section 38
Section 44	.	.	.	.	.	Omitted.
Sections 45 to 51	.	.	.	.	.	Omitted.
Section 52	.	.	.	.	.	Section 39
Section 53	.	.	.	.	.	Section 40
Section 54, First paragraph	.	.	.	.	.	Section 41 (1)
,, 54, Second paragraph	.	.	.	.	.	,, 41 (2)
,, 54, Third paragraph, clause (a)	.	.	.	.	.	,, 41 (3)(a)
,, 54, Third paragraph, clause (b)	.	.	.	.	.	,, 41 (3)(b)
,, 54, Third paragraph, clause (c)	.	.	.	.	.	,, 41 (3)(c)
,, 54, Third paragraph, clause (d)	.	.	.	.	.	Omitted.
,, 54, Third paragraph, clause (e)	.	.	.	.	.	Section 41 (3)(d)
,, 54, Explanation	.	.	.	.	.	,, 41, Expl.
Section 55	.	.	.	.	.	Section 42
Section 56 (a)	.	.	.	.	.	Section 44 (a)
,, 56 (b)	.	.	.	.	.	,, 44 (b)
,, 56 (c)	.	.	.	.	.	,, 44 (c)
,, 56 (d)	.	.	.	.	.	Omitted.
,, 56 (e)	.	.	.	.	.	Section 44 (d)
,, 56 (f)	.	.	.	.	.	,, 44 (e)
,, 56 (g)	.	.	.	.	.	,, 44 (f)
,, 56 (h)	.	.	.	.	.	,, 44 (g)
,, 56 (i)	.	.	.	.	.	,, 44 (h)
,, 56 (j)	.	.	.	.	.	,, 44 (i)
,, 56 (k)	.	.	.	.	.	,, 44 (j)
Section 57	.	.	.	.	.	Section 45

TABLE B

Showing the provisions in Appendix I and the corresponding provisions, if any, in the existing Act.

Provision in Appendix I	Corresponding provision, if any, in the existing Act.
I	2
Section 1	Section 1
Section 2 (a)	Section 3
" 2 (b)	"
" 2 (c)	New
" 2 (d)	New
" 2 (e)	Section 3 (last para).
Section 3 (a)	Section 4 (b)
" 3 (b)	" 4 (c)
Section 4	Section 7
Section 5	Section 8
Section 6	Section 10
Section 7	Section 11
Section 7 Explanation	New
Section 8	New
Section 9	Section 12(b) & (c).
Section 10	Section 12, Explanation (earlier portion)
Section 11 (1)	New
" 11 (2)	Section 12, Explanation (last portion)
Section 12 (1)	Section 12 (a)
" 12 (2)	Section 21 (e)
Section 13 (1)(a)	Section 21 (a)
" 13, (1)(a) Exception	New
" 13 (1)(b)	Section 21(b)
" 13 (1)(c)	" 21 (d)
" 13, (1) Exception	New
" 13 (1)(d)	Section 21(g)
" 13 (1), Exception	New
" 13 (2)	Section 21, last paragraph.
Section 14 (1)	Section 17
" 14 (2)	Section 14
" 14 (3)	Section 15
" 14 (4)	Section 16
" 14, Explanation	Section 13
Section 15	Section 18
Section 16	Section 25
Section 17	New
Section 18	Section 19
Section 19	New
Section 20	Section 20
Section 21 (1)	Section 22, first para.
Section 21 (2)(a)	Section 22, second para.—I.
Section 21 (2)(b)	Section 22, second para—II.
" 21 (2)(c)	New
" 21 (2), Explanations 1 & 2	New
" 21 (3)	Section 22, third para.—III.
" 21 (4)	New

Section 22 (a)	.	.	.	.	Section 23 (a)
" 22 (b)	.	.	.	.	" 23 (b)
" 22 (c)	.	.	.	.	" 23 (c)
" 22 (d)	.	.	.	.	" 23 (g)
" 22 (e)	.	.	.	.	" 23 (h)
Section 23 (a)	.	.	.	.	Section 27 (a)
" 23 (b)	.	.	.	.	" 27 (b)
" 23 (c)	.	.	.	.	" 27 (c)
" 23 (d)	.	.	.	.	" 27 (d)
" 23 (e)	.	.	.	.	" 27 (e)
Section 24 (a)	.	.	.	.	Section 24 (a)
" 24 (b)	.	.	.	.	" 24 (b)
" 24 (c)	.	.	.	.	New
" 24, Explanation	.	.	.	.	New
Section 25 (a)	.	.	.	.	Section 26 (a)–(c)
" 25 (b)	.	.	.	.	" 26 (d)
" 25 (c)	.	.	.	.	" 26 (e)
Section 26 (1)	.	.	.	.	Section 35 (c), part.
" 26 (2), part	.	.	.	.	" 35 (c) part
" 26 (2), part	.	.	.	.	" 35, 3rd paragraph.
" 26 (3) (a)	.	.	.	.	" 35, 2nd paragraph.
" 26 (3) (b)	.	.	.	.	New
" 26 (4) & (5)	.	.	.	.	New
Section 27	.	.	.	.	Section 29
Section 28	.	.	.	.	Section 30
Section 29	.	.	.	.	Sections 31 and 34
Section 30 (1)	.	.	.	.	Section 35 (a) and (b)
" 30 (2)	.	.	.	.	New
" 30, Explanation	.	.	.	.	New
Section 31	.	.	.	.	Section 37
Section 32	.	.	.	.	Section 38
Section 33	.	.	.	.	Section 39
Section 34	.	.	.	.	Section 40
Section 35	.	.	.	.	Section 41
Section 36	.	.	.	.	New
Section 37 (1)	.	.	.	.	Section 42
" 37 (2)	.	.	.	.	New
Section 38	.	.	.	.	Section 43
Section 39	.	.	.	.	Section 52
Section 40	.	.	.	.	Section 53
Section 41 (1)	.	.	.	.	Section 54, first para.
" 41 (2)	.	.	.	.	" 54, second para.
" 41 (3) (a)	.	.	.	.	" 54, third para., clause (a)
" 41 (3) (b)	.	.	.	.	" 54, third para., clause (b)
" 41 (3) (c)	.	.	.	.	" 54, third para., clause (c)
" 41 (3) (d)	.	.	.	.	" 54, third para., clause (e)
Section 42	.	.	.	.	Section 55
Section 43	.	.	.	.	New
Section 44 (a)	.	.	.	.	Section 56 (a)
" 44 (b)	.	.	.	.	" 56 (b)
" 44 (c)	.	.	.	.	" 56 (c)
" 44 (d)	.	.	.	.	" 56 (e)
" 44 (e)	.	.	.	.	" 56 (f)
" 44 (f)	.	.	.	.	" 56 (g)
" 44 (g)	.	.	.	.	" 56 (h)
" 44 (h)	.	.	.	.	" 56 (i)
" 44 (i)	.	.	.	.	" 56 (j)
" 44 (j)	.	.	.	.	" 56 (k)
Section 45	.	.	.	.	Section 57
Section 46	.	.	.	.	New

APPENDIX III

SUGGESTIONS IN RESPECT OF OTHER ACTS

I. *Arbitration Act, 1940.*

Sec. 32.—After the words “nor shall any arbitration agreement or award be” the word “enforced” should be inserted and in the marginal note the word “contesting” should be substituted by “relating to”. [Para. 73].

II. *Code of Civil Procedure, 1908.*

Appropriate provisions should be made in Orders XX—XXI of the Code to the effect that all post-decree proceedings necessary to get complete relief in terms of the decree in a suit for specific performance shall be by application in the suit itself, together with provisions for appeal from orders passed in such proceedings. [Para. 81].



NOTE BY DR. N. C. SEN GUPTA

I generally agree with the provisions of the report regarding the Specific Relief Act and have only a few points to refer to.

Regarding section 4, clause (a) has been recommended to be deleted. It has been said that "There is no question of any specific relief being granted in respect of a mere agreement". As a statement of the law, it is hardly precise and it depends first of all on the definition of 'Contract' in the Contract Act and its distinction from an agreement. Secondly, even assuming the present definition of 'Agreement' and 'Contract' to be retailed, which I should say should not be done, this is not precisely correct. There are some agreements which are enforceable, although they are not contracts. The most apposite case is that of an agreement under section 53A of the Transfer of Property Act. Such an agreement is ordinarily negatively enforceable as a defence. But as interpreted by the Calcutta High Court, the right of the landlord, as provided by the agreement, shall be enforceable, notwithstanding section 53A being defensive. Therefore, this should remain in any case. This paragraph has to be taken along with the provisions in section 53A.

With regard to section 5, the propositions may be elementary. Then this section serves as the definition of "Specific Relief". There is nothing else to indicate what in this Act specific relief means. This section may be substituted by the section defining "Specific Relief".

Section 9—For reasons already indicated by me in my note on the Indian Limitation Act, I think it is necessary to retain the provisions of section 9.

I must say that there is some justification for the complaint that a suit under section 9 does not serve the purpose of expediting litigation but often results in a further litigation on title. Nevertheless, as the question

of title should not be made an issue in the suit, the party in possession who is dispossessed gets an initial advantage by getting back possession and throws the burden on the disseisor to prove his title, this advantage should not be taken away. A title suit would ordinarily be a long drawn one followed by more than one appeal and it would be inequitous to allow a trespasser who has taken the law into his own hands to keep his possession for all the time that the suit formed as a title suit would take. In a plaint in a title suit the plaintiff will have to aver and prove his title though he has a clear case of possession, and thus bears an initial burden of proof of title. There is no positive law which would in such a case place the burden on the disseisor. It is conceivable that where a plaintiff alleges dispossession while in possession the case may be tried in two stages, first on the issue of possession and dispossession, the burden would shift on the defendant who would then have to prove his title. But that would not simplify the litigation, while it will keep the unlawful disseisor much longer in possession. In any case this matter may be considered in connection with burden of proof in the Evidence Act.

(Sd.) N. C. SEN GUPTA.

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